INDEX.

	Page
Statement	1
Petition	2
Affidavit	7
Defendant's Answer to Petition	8
Motion for Directed Verdict	10
Verdict for Plaintiff	11
Judgment	12
Judgment Order, June 11, 1932	13
Judgment Order, June 22, 1932	14
Defendant's Bill of Exceptions	15

Testimony.

Witnesses for Plaintiff:

Lumbra, Newton W.

Direct Examination 16

Re-called:

Cross Examination 82

Re-direct Examination 98, 104, 245

Re-cross Examination 99, 237

Bell, Walter E.

Direct Examination 42

Cross Examination 50

Re-direct Examination 56

Re-called:

Re-cross Examination 64

Pollard, Capt. R. H.

Direct Examination 57

Cross Examination 62

Foley, Cordes M.

Direct Examination 65

Cross Examination 68

PAGE

Re-direct Examination 70
Re-cross Examination 71

Dow, Charles H.
Direct Examination 72
Cross Examination 74

Paquette, Louis J.
Direct Examination 75
Cross Examination 79
Re-direct Examination 81

Brissette, Mitchell
Direct Examination 105
Cross Examination 110

Lumbra, Mrs. Florence
Direct Examination 111
Cross Examination 115

Dodge, John R.
Direct Examination 116
Cross Examination 118

Hunt, Dr. Frank B.
Direct Examination 119
Re-called:
Direct Examination 124
Cross Examination 125
Re-direct Examination 126

Carroll, John S.
Direct Examination 121
Cross Examination 122

Souliere, Alfred A.
Direct Examination 127
Cross Examination 130

Noell, H. G.
Direct Examination 131
Cross Examination 139

Lumbra, Fremont
Direct Examination 142
Cross Examination 149

PAGE

Sumner, Charles S.
Direct Examination 152
Cross Examination 153
Johnson, Dr. Howard H.
Direct Examination 153
Cross Examination 155
Re-direct Examination 156
Re-cross Examination 157
Davidson, Dr. Allan
Direct Examination 157
Cross Examination 161
Re-direct Examination 165, 166
Re-cross Examination 165, 166
Herman, Dr. Byron
Direct Examination 167
Cross Examination 172
Skeels, Dr. Albee A.
Direct Examination 173
Cross Examination 179

Witnesses for Defendant:
Domina, Charles H.
Direct Examination 188
Wright, W. J.
Direct Examination 198
Chapel, George H.
Direct Examination 200
Cross Examination 201
Upton, Dr. Waldo J.
Direct Examination 202
Cross Examination 205
Re-direct Examination 209
O'Neil, Dr. J. C.
Direct Examination 210
Cross Examination 212

PAGE

Lavalla, Frank
Direct Examination 213
Cross Examination 215
Re-direct Examination 215
Chapel, Mrs. Ada
Direct Examination 216
Wood, Capt. Jack B.
Direct Examination 218
Berryman, George P.
Direct Examination 223
Re-called:
Direct Examination 230
Cross Examination 236
Motion for Directed Verdict 246
Preliminary Charge 248
Arguments 251
Charge and Exceptions 258
Verdict 265

EXHIBITS.

Plaintiff's Exhibit:
Exhibit 1—Statement by Frank B. Hunt, dated Dec 7, 1920. Referred to in evidence at Fols. 359, 370. Printed at Fol. 797 266

Defendant's Exhibits:
Exhibit A—Scheme of Reports of Physical Examinations, dated Dec. 10, 1920, made by Byron Herman, M. D. Referred to in evidence at Fol. 515. Printed at Fol. 799 267
Exhibit B—Certified copy of documents from the War Department, pertaining to Newton W. Lumbra. Referred to at Fols. 659, 667. Printed at Fol. 805 269

PAGE

Exhibit C—Record from Central Vermont Railway Company recommending appointment, application for employment, etc., December, 1924. Offered in evidence at Fol. 706. Printed at Fol. 841 281

Exhibit D—Record from Central Vermont Railway Company, recommending appointment, application for employment, etc., July, 1922. Offered in evidence at Fol. 706. Printed at Fol. 850 284

Exhibit E—Record from Central Vermont Railway Company, recommending appointment, application for employment, etc., February, 1924. Offered in evidence at Fol. 706. Printed at Fol. 860 287

Exhibit F—Claim for Compensation made by Newton W. Lumbra, verified January 17, 1921. Admitted in evidence at Fol. 711. Printed at Fol. 871 291

Exhibit G—Application for Compensation and Vocational Training, made by Newton W. Lumbra, verified March 21, 1922. Admitted in evidence at Fol. 711. Printed at Fol. 884 295

Petition for Appeal 302

Assignment of Errors 303

Citation 318

Acceptance of Service 319

Supplemental Assignment of Errors 320

Clerk's Certificate 330

Proceedings in United States circuit court of appeals, second circuit. 332

Opinion, Hand, J. 332

Judgment 336

Clerk's certificate 336

Order extending time 337

Order allowing certiorari 338

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT.

NEWTON W. LUMBRA,

vs.

UNITED STATES OF AMERICA.

Statement.

2 This action was commenced by petition dated November 30, 1931. It is an action brought by Newton W. Lumbra, plaintiff, against the United States of America, defendant. The petition was served on the United States Attorney, Burlington, Vermont, on December 8, 1931, and a copy of the petition was mailed, registered, to the Attorney General of the United States, Washington, D. C., on January 13, 1932.

3 The answer of the defendant was filed on February 5, 1932.

The trial of this case was commenced on April 18, 1932, before Honorable Harland B. Howe, District Judge, and a jury, and was concluded on April 20, 1932.

On April 20, 1932, the defendant moved the Court at the close of all the evidence, to direct a verdict for the defendant, and on the same date, the motion was denied.

On April 28, 1932, the Court extended the term for a period of three months.

On April 28, 1932, judgment on the verdict was entered for the plaintiff.

On July 27, 1932, the defendant filed its petition for appeal, together with its Bill of Exceptions and Assignment of Errors.

On August 17, 1932, the defendant filed a Supplemental Assignment of Errors.

Petition.

UNITED STATES DISTRICT COURT.

DISTRICT OF VERMONT.

NEWTON W. LUMBRA,

vs.

UNITED STATES OF AMERICA.

Now comes Newton W. Lumbra of St. Albans in the County of Franklin, District of Vermont, who respectfully shows that he was a soldier in the U. S. Army during the World War, so-called, from July 14, 1917 until about April 29, 1919. And your petitioner further shows that during said service he was duly insured by the U. S. Government under a War Risk Insurance Policy,

duly issued by said U. S. Government and said 7
policy was in effect and paid for at the time of
petitioner's discharge from the U. S. Army.

Your petitioner further shows that during said Army service and while with the 26th Division (Yankee Division) in France, he was seriously injured by the exploding of a high explosive shell whereby he was thrown a great distance and rendered unconscious and was severely bruised and injured about the body in that he received a broken ankle and other serious injuries. And 8
your petitioner further shows that by reason of being so thrown by said high explosive shell he was confined in hospitals for a long period of time and developed thereafter a brain or nerve trouble sometime known and commonly understood as shell shock. And your petitioner further shows that after said hospitalization he was later returned to his outfit 103 Machine Gun Battalion, but by reason of the disability he was suffering as a result of the injury above described he was left in a badly shattered nerve condition 9
and was unable to carry on as a full duty soldier with his said outfit but was kept on light duty where little or no work was required during the remainder of the period that his outfit remained in France and up to the time of his discharge from said U. S. Army on the 29th of April, 1919.

And your petitioner further shows that by reason of said injury resulting in said brain or nerve trouble as above set forth that he was suffering the effects of said injury at the time of his discharge from the U. S. Army and was totally dis-

10 abled at the date of his said discharge from the U. S. Army from an occupational standpoint. Your petitioner further says that in view of the medical treatment which he has undergone and the fact that his disability has continued from the date of his injury, down to and including the present date, and that it indicates no sign of improvement or cure, that his present condition and his condition since date of discharge is a permanent disability and will continue and will be permanent and therefore his disability at the present
11 time and at all times from date of injury received by him in service and since date of discharge has been a permanent and total disability.

Your petitioner further says that by reason of the fact that he was totally and permanently disabled at the time of his discharge from the U. S. Army that his said War Risk Insurance Policy thereupon became due and payable and he further says that the complete evidence of this permanent and total disability, which caused said
12 policy to become payable was presented to the U. S. Veterans Bureau and a claim for payment of the same and of the sums then and there due and payable under said War Risk Insurance Policy, was properly made by your petitioner to said War Risk Insurance Bureau. And your petitioner further says that although proper evidence has been submitted establishing the right to such payment and proper demand has been made therefore nevertheless the U. S. Government has neglected and refused to recognize said insurance policy and the petitioner's rights to

payment thereon and has refused to pay over to 13
your petitioner such sums of money as have become due since the date of your petitioner's permanent and total disability, to wit from April 29, 1919 up to and including the present date. Your petitioner further says that the U. S. Government in refusing and neglecting to pay your petitioner such sums of money as have become due under said War Risk Insurance Policy, following the submission of proper evidence of permanent and total disability since April 29, 1919, is without right and contrary to law; your petitioner 14
further claims that at the present time he is permanently and totally disabled as a result of his service in the U. S. Army and has been permanently and totally disabled since the date of the injury received by him in France, to wit, June 17, 1918. Your petitioner further claims that the refusal and neglect of the U. S. Government to pay him such sums of money as are legally due him under said War Risk Insurance Policy is a great damage to him, to wit, the sum of Ten thousand ($10,000.00) Dollars, to recover which, with 15
just costs, the petitioner brings suit.

Dated at Burlington, in the County of Chittenden, this 30th day of November, A. D. 1931.

(Sd.) NEWTON W. LUMBRA.

(Sd.) J. A. McNamara became recognized for costs in the above action as the law directs.

Before me,
(Sd.) Harold Sylvester,
Notary Public.

Petition.

State of Vermont,
Chittenden County. } ss.:

At Burlington in said County this 30th day of November, A. D. 1931, personally appeared before the undersigned authority, NEWTON W. LUMBRA, the plaintiff in the above cause, who, being duly sworn as to the truth of the allegations made in the foregoing petition, says that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge except as to matters therein stated to be on information and belief, and as to those he believes them to be true.

Before me,

(Sd.) HAROLD SYLVESTER,
Notary Public.

United States of America,
District of Vermont. } ss.:

At Burlington, in said District, on the 5th day of December, A. D. 1931, I made service of this petition by delivering to the Honorable Harry B. Amey, United States Attorney within and for the District of Vermont, a true and attested copy thereof with this my return hereon thereon endorsed.

Attest,

A. W. HARVEY,
United States Marshal.
by H. F. WAKEFIELD,
Deputy U. S. Marshal.

Affidavit.

Travel	.06	19
Service	2.00	
	$2.06	

Endorsed:
Filed December 2, 1931,
A. Myrl Blakely,
Deputy Clerk.

Affidavit.

U. S. DISTRICT COURT. 20

DISTRICT OF VERMONT.

NEWTON W. LUMBRA,
vs.
U. S. OF AMERICA.

I, J. A. McNamara, attorney for Newton W. Lumbra, plaintiff in the above entitled case, on oath depose and say as follows:

On the 8th day of December, 1931 a copy of the 21
petition in the above entitled suit was duly served by the U. S. Marshal, within and for the District of Vermont, on Harry B. Amey, U. S. District Attorney, within and for the District of Vermont, and on the 13th day of January, 1932 a copy of said petition was mailed to the Attorney General of the United States at Washington, D. C. under registered mail with return receipt requested. The return receipt is hereunto attached and made a part hereof.

Defendants' Answer to the Petition.

Dated at Burlington this 23rd day of January, 1932.

J. A. McNAMARA.

Subscribed and sworn to before me this 23rd day of January, 1932.
Francis D. Foley,
Notary Public.

Return receipt from Department of Justice dated January 15, 1932 attached.

Filed January 23, 1932,
A. Myrl Blakely,
Deputy Clerk.

Defendant's Answer to the Petition.

IN THE
DISTRICT COURT OF THE UNITED STATES.

DISTRICT OF VERMONT.

NEWTON W. LUMBRA, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	Law No. 816.

Now comes the defendant, the United States of America, by its attorney, Allen Martin, Assistant United States Attorney in and for the District of Vermont, and makes answer to the plaintiff's petition as follows:

Defendants' Answer to the Petition.

Defendant is without information as to plaintiff's legal residence and therefore denies the allegation regarding same. 25

The allegation as to military service of plaintiff is admitted.

It is admitted that during his military service plaintiff was granted war risk insurance, which was in force at the date of his discharge, but it is denied that an insurance policy was issued. 26

The allegations of the second grammatical paragraph of the petition have been made the subject of a Motion to Strike.

It is denied that plaintiff was at the time of his discharge from military service, or has been at any time since that date, permanently and totally disabled, thereby maturing his contract of war risk term insurance.

It is admitted that plaintiff has made demand for the payment of insurance benefits, that such demand has been refused, and that a disagreement exists between plaintiff and defendant. 27

It is denied that plaintiff has been permanently and totally disabled at any time while his contract of war risk insurance was in full force and effect.

Wherefore defendant, having fully answered, prays that said petition may be dismissed and that the United States may have such other and

28 further relief as seems just and proper in the premises.

....., United States Attorney.

ALLEN MARTIN, Assistant United States Attorney.

WILLIAM J. HESSION, Insurance Attorney Veterans Administration.

Filed February 5, 1932,
Austin H. Kerin,
29 Clerk.

Motion for Directed Verdict.

UNITED STATES DISTRICT COURT.

DISTRICT OF VERMONT.

NEWTON W. LUMBRA, vs. UNITED STATES OF AMERICA. } No. 816.

30

Now comes the defendant in the above entitled action, at the close of all the evidence, and moves for a directed verdict in its favor on the ground that upon all the law and the evidence in this case the plaintiff is not entitled to recover, for the reason that plaintiff has not proved he was permanently and totally disabled on or before May 31st, 1919, and that the evidence introduced in the case is insufficient to support a finding that

the plaintiff was permanently and totally disabled 31
on or before the 31st day of May, 1919.

HARRY B. AMEY,
United States Attorney
For the District of Vermont.

By
FRANCIS J. FITZGERALD,
Assistant Insurance Attorney.

Filed April 20, 1932,
Austin H. Kerin, Clerk.
By Arnold A. Murray, 32
Deputy.

Verdict for Plaintiff.

NEWTON W. LUMBRA, vs. UNITED STATES OF AMERICA.	Civil No. 816.

In this cause the jury on their oath say that 33
the defendant is liable in manner and form as the plaintiff in his declaration hath alleged and find for the plaintiff to recover from the defendant $57.50 a month from May 31, 1919, to March 31, 1932, inclusive, being 155 months and amounting to the sum of $8,912.50.

DANIEL M. ST. GEORGE,
Foreman.

Filed April 20, 1932,
Arnold A. Murray,
Deputy Clerk.

Judgment.

34 UNITED STATES DISTRICT COURT.

DISTRICT OF VERMONT.

NEWTON W. LUMBRA, vs. UNITED STATES OF AMERICA.	At Law No. 816.

ORDERED that judgment be entered on the
35 verdict in this case for the plaintiff to recover from the defendant $57.50 a month from May 31, 1919, to March 31, 1932, inclusive, being 155 months, and amounting to the same of $8,912.50.

Dated at Burlington, Vermont, April 28, 1932.

HARLAND B. HOWE,
United States District Judge.

Filed April 28, 1932,
Austin H. Kerin,
36 Clerk.

Judgment Order.

UNITED STATES DISTRICT COURT. 37

DISTRICT OF VERMONT.

NEWTON W. LUMBRA, vs. UNITED STATES OF AMERICA.	No. 816, March Term, 1932.

And now if is further adjudged that J. A. McNamara of Burlington, County of Chittenden, 38
State of Vermont, attorney of record for the plaintiff, be paid as a reasonable attorney fee the sum of ten per cent of the amount of the judgment recovered herein, amounting to $891.25, (and that he be paid the sum of $361.80 as and for his reasonable and necessary disbursements in and about the preparation and trial hereof, which are fully set forth in the schedule filed in the motion for said allowance); and that he receive nothing from any future payments of the insurance on which this suit is based. 39

Done in Court at Burlington this 11th day of June, 1932.

HARLAND B. HOWE,
United States District Judge.

Filed June 11, 1932,
A. Myrl Blakely,
Deputy Clerk.

Judgment Order.

UNITED STATES DISTRICT COURT.

DISTRICT OF VERMONT.

NEWTON W. LUMBRA, vs. UNITED STATES OF AMERICA.	At Law No. 816.

On motion of the Assistant United States Attorney it is

ORDERED that the judgment order entered herein on June 11th, 1932, allowing J. A. McNamara, attorney for the plaintiff, as a reasonable attorney fee, the sum of ten percent of the amount of the judgment herein, amounting to $891.25, be amended by striking out the words in said order "and that he be paid the sum of $361.80 as and for his reasonable and necessary disbursements in and about the preparation and trial hereof, which are fully set forth in the schedule filed in the motion for said allowance;" so that said order will read as follows:

And now it is further adjudged that J. A. McNamara, of Burlington, County of Chittenden, State of Vermont, attorney of record for the plaintiff, be paid as a reasonable attorney fee the sum of ten percent of the amount of the judgment recovered herein, amounting to $891.25, and that he receive nothing from any future payments of the insurance on which this suit is based.

Done in Court at Burlington, this 22nd day of June, 1932.

HARLAND B. HOWE,
United States District Judge.

Filed June 22, 1932,
A. Myrl Blakely,
Deputy Clerk. 43

Defendant's Bill of Exceptions.

UNITED STATES DISTRICT COURT.

FOR THE DISTRICT OF VERMONT.

NEWTON W. LUMBRA,
vs.
UNITED STATES OF AMERICA. } Law No. 816. 44

This cause came on for hearing at the Adjourned Special March Term, 1932, of the United States District Court for the District of Vermont, before Honorable Harland B. Howe, Judge of said Court, and a jury. H. C. Sylvester, Esquire, and J. A. McNamara, Esquire, appeared for the plaintiff. William J. Hession, Esquire, and Francis J. FitzGerald, Esquire, appeared for the defendant. 45

The trial was begun at Burlington, Vermont, on the eighteenth day of April, 1932, continuing up to and including April 20, 1932, when it was concluded.

The petition with amendments thereto, verdict for the plaintiff, the charge of the Court, and the judgment are referred to and made a part hereof.

46 The jury having been duly impanelled and sworn, the case was opened to the Court and jury on behalf of the plaintiff, and thereupon the following proceedings were had, oral and documentary evidence was introduced as follows, and objections were made and exceptions allowed to the defendant as shown in the following complete transcript of the proceedings:

NEWTON W. LUMBRA, the plaintiff, being duly sworn, testified as follows:

47

Direct Examination by Mr. McNamara:

Q. Your name is Newton W. Lumbra and you are the plaintiff in this case? A. Yes, sir.

Q. And you are now a resident of St. Albans? A. Yes, sir.

Q. Where did you live prior to the War? A. Montgomery.

Q. Born and brought up there, were you? A. Yes.

48 Q. And what time did you enter the War service? A. July, 1917.

Q. And where did you enlist? A. Fort Ethan Allen.

Q. In the St. Albans National Guard, was it? A. Yes.

Q. How far did you go in school? A. Eighth grade.

Q. And how old were you when you entered the army? A. Twenty-five.

Q. So you had been out of school a number of years? A. Yes, sir.

Q. Had you had some employment all that 49
time? A. Yes, sir.

Q. What had been your employment for the last two or three or four years prior to going in the army? A. In the woods and shop and different places.

Q. For whom did you work? A. For Nelson Hall Co.

Q. And were you in the woods for some period? A. Yes.

Q. For how long at any one period? A. Why, a year. 50

Q. You were in there on one job for a year, were you? A. Yes.

Q. What year was that? A. I think it was 1915.

Q. Was your brother in on that same job? A. Yes.

Q. And after you got through in the woods, where did you go and work? A. I worked in the mill for a while after that.

Q. That is the Hall mill? A. Yes. 51

Q. That is located at Montgomery? A. Yes.

Q. How long were you there after this job in the woods? A. Probably six or eight months.

Q. Do you know how long you got through there before you went into the army? A. It wasn't very long.

Q. A matter of a few months, was it? A. A few months.

Q. What did you do the last few months before you went in the army? A. Worked on the farm.

52 Q. Where was that farm? A. Richford.

Q. Now, during those two or three years you have just told us about, what had your work been, steady or unsteady? A. Steady.

Q. Did you lose any time? A. No.

Q. Have any illness? A. No, sir.

Q. Any trouble with your health in any way, shape or manner? A. No, sir.

Q. Did you have any trouble passing the physical examination in the army? A. No, sir.

Q. What did you weigh at that time? A.
53 About 140.

Q. Had you ever had any army service before this? A. No, sir.

Q. You went in just what time? A. July 14, 1917.

Q. How long did you stay at Fort Ethan Allen? A. I don't know exactly how long. We were there—we weren't there very long.

Q. From there where did you go? A. Camp Bartlett, Westfield.

54 Q. Stayed there a while? A. Until October, I think.

Q. From there where did you go? A. Went overseas.

Q. Your outfit was part of what division? A. The 26th Division.

Q. That is the Yankee Division? A. Yes.

Q. The First Vermont Regiment all became part of that, did it? A. Yes.

Q. Did you go in training some place overseas? A. Yes.

Q. Stayed in training how long? A. Until February. 55

Q. In February what happened? A. Went to the trenches.

Q. That was the first action your outfit saw, was it? A. Yes.

Q. From February up until June, tell us briefly what your career had been over there, —just what the activity was? A. Well, we was in the Chemin des Dames front, the first front we went into. When we come out of there, we went on the Toul front,—went into line two or three different times, and then we went up to Xercay, June 16th I think it was,—that is where I got injured. 56

Q. So you had been on the Chemin des Dames front and on the Toul sector and these other places before you arrived at this Xercay front where you were injured? A. Yes.

Q. Between these various fronts were you back some place in training? A. Yes.

Q. Had you seen active fighting on these various fronts? A. Yes. 57

Q. What had been your duties with your company? A. I was number 3 man in the gun squad.

Q. What was your outfit,—what type of company? A. Machine gun battalion; Company.

Q. You say you were number three man on the gun? A. Yes.

Q. Had you been in that position on these various fronts? A. Yes.

Q. And, of course, had been under fire and fighting on those various fronts? A. Yes.

58 Q. Do you remember the day you were hit or injured? A. I think it was June 17th.

Q. What time of the day? A. About half past eight in the morning, I should think.

Q. How did it come about? Just what were you doing at that time? A. The enemy threw over a bombardment about three o'clock in the morning, we had just come out of guard duty and entered the dugout and they started to throw over a bombardment and we had to go out into the trenches; we stayed out there until about
59 eight thirty I should judge, when I was on the way back to the dugout; that is when this shell threw me and injured me.

Q. Tell us about that shell and describe what happened there. A. I was on the way to my dug out, it wasn't probably over fifty or sixty feet from the dugout when this shell came over and landed and that is the last thing I knew. I was in the dugout, they picked me up.

Q. You knew nothing until they picked you up? A. I didn't know nothing until I came to
60 in the dugout.

Q. Do you know what kind of a shell it was? A. Well, I don't know, it must have been 155.

Q. That is a high explosive? A. Yes.

Q. Did you see the crater of that shell afterwards? A. Yes.

Q. How big a crater did it make? A. Well—probably twenty feet across.

Q. And how deep? A. Ten or twelve feet probably.

Q. And it was the explosion of the shell that

made that crater that threw you to the ground, was it? A. Yes. 61

Q. And you came to in the dugout? A. Yes.

Q. Do you know how long you had been unconscious? A. No, I don't.

Q. What was your condition when you came to? A. I was very shaken and weak and beads of sweat stood right out on me.

Q. Any broken bones? A. Ankle.

Q. How long were you kept there in the dugout? A. We stayed there until that night when I was taken to the hospital. 62

Q. Have some medical treatment there? A. First aid.

Q. And how were you taken back that night? A. In the ambulance.

Q. Do you know where you went? A. I went to the 102nd Field Hospital over there; then when the Division was relieved I went to the Base Hospital.

Q. How long were you kept in hospitals? A. I came out sometime I think the latter part of August; right after the Company came out of the Chateau Thierry drive. 63

Q. Did you go back to the Company? A. Yes.

Q. During the time you were in the hospital did you notice anything different about your condition than there had been before? A. Yes, I did.

Q. Tell us just what you noticed? A. I used to have faint, weak spells, dizzy spells,—everything go black, and the sweat stand out on me and I would have to sit down.

64 Q. How often did you have those? A. Probably sometimes once a week and sometimes oftener.

Q. Did you have any medical treatment for them? A. No, I did not.

Q. Did you call the Doctor's attention to that? A. No, I didn't.

Q. Any reason why you didn't? A. I didn't want to stay in the hospital. I wanted to go back to the Company.

Q. As soon as your ankle was all right, you
65 went back? A. Yes.

Q. You stayed with the outfit the rest of the time? A. Yes.

Q. Did you ever go back to your original duties? A. No.

Q. What did they do? A. The Captain was asking one day—wanted to know how I felt, and I told him, and he said "stay in the kitchen and work."

Q. Did you do that the rest of the time? A. Yes.

66 Q. Did the kitchen get up near the lines at any time? A. No.

Q. How far back would the kitchen stay from the actual fighting? A. I don't know exactly but quite a distance.

A. Was it far enough back so you were generally away from the bombardment? A. Yes.

Q. What about these spells,—did you have any of these after you got back to the Company? A. Yes.

Q. How often? A. About the same as they were. 67

Q. Tell us how they affected you there, whether they were worse or less? A. They kept getting gradually worse as they went on—as time went on.

Q. Did the men there working in the kitchen know anything about this? A. I never said anything to them about this.

Q. Did your Company officers ever put you on guard duty again? A. No.

Q. You were in touch with them right along and they saw you there, did they? A. Yes. 68

Q. When the outfit moved, how were you moved? Did you go along the same as they did? A. Yes; I didn't carry any pack.

Q. Did you have rifles to carry? A. No.

Q. You simply had your pack to carry? A. Yes.

Q. How was it carried? A. Put on the gun car.

Q. Did you hike or did you ride? A. Sometimes I hiked and sometimes I rode. 69

Q. Were you supposed to ride? A. Well, I did any way.

Q. Do you remember how long you stayed in France after this? A. In France?

Q. Yes? A. Stayed there until April 6th.

Q. And then the Company came back to the States? A. Yes.

Q. And you were discharged when? A. April 29, 1919.

Q. That was at Camp Devens? A. Yes.

70 Q. And you went from there to your home, did you? A. Yes.

Q. Now, during this time, what about your insurance policy? Had you taken one out? A. Yes.

Q. And had you paid for it? A. Yes.

Q. How much were you paying for this? A. I think it was six-sixty a month.

Q. How much was your pay? A. Well, it was thirty dollars on this side and thirty-three across.

71 Q. And that six-sixty was taken out of your pay, was it? A. Yes.

Q. When was the last month you paid for that? A. I guess it was paid in advance. I think it didn't lapse until May 29th.

Q. You paid up until the time you got out of the army, did you? A. Yes.

Q. And was that paid during all the time? Did you pay if while in the hospital? A. Yes, it was taken out of my pay.

72 Q. What was your condition at the time you got out of the army in comparison with your condition when you went in the army, as near as you can tell it in your own words? A. It wasn't so good as it was when I went in, that's sure.

Q. Why wasn't it? A. On account of these spells I was having.

Q. You were having them at the time you got out? A. Yes.

Q. Describe the spells as you were having them at the time you got out of the army? A. I would get dizzy and weak and everything go

black around me, and I would just have to sit down or I would fall down. 73

Q. How did your head feel? A. I had terrible pain in my head. It started right in the back and worked up over the top of my head.

Q. How long would that pain continue? A. Oh, sometimes it would continue for a whole day.

Q. After everything became black and you had to stop, as you say, and rest, would there then be some relief? A. Yes, there would after a while.

Q. For how long would you be withouf this feeling? A. I might go along for a few days and it would come on to me again. 74

Q. Now, had the frequency of these increased or decreased from the time they started? A. Increased.

Q. How often were you having them at the time you got out of the army? A. How often was I having them when I got out of the army?

Q. Yes?. A. Probably once or twice a week.

Q. When you got home to Montgomery, what did you do when you first got there? A. Nothing; just stayed to home and rested. 75

Q. For how long did you rest? A. Three or four months.

Q. What was your condition during that time? A. Just the same as it had been. It kept getting worse a little all the time.

Q. Did the rest help you any? A. It didn't appear to, no.

Q. Where were you staying? A. At my mother's.

76 Q. Where does she live? A. At Montgomery.

Q. Does she live in the village or outside? A. In the village.

Q. After three or four months, what did you do then? A. I went to work; tried to work.

Q. Where did you take employment? A. At the Nelson Hall Co.

Q. That is the same place you had been before you went in the army? A. Yes.

Q. How long did you stay with them? A. Well, I was there the rest of 1919 and '20.

77 Q. Did you stay there into the year 1921? A. I didn't work much in the year 1921.

Q. Now, during 1919 and 1920 while you were there, what was your employment? A. Well, I worked in the mill there.

Q. Now, before you went into the army, what type of work had you done there at Nelson Hall's? A. I was rolling logs into the vats; heavy logs.

Q. How many hours a day did you put in at that? A. I was working nine or ten hours.

78 Q. And that is what you did all day? A. Yes.

Q. When you come back and took employment, what type of work did you do then? A. I tried to do that but I couldn't.

Q. How long did they keep you on that? A. Not very long.

Q. Did they change you? A. Yes.

Q. What did they put you on then? A. Inside; lighter work.

Q. Were you able to do that? A. Well, some of the time; I couldn't work steady.

Q. How much time did you lose there? A. I didn't work half of the time. 79

Q. Did you work as much of the time as you were able to? A. Yes.

Q. How about these spells, during this period 1919 and '20, along there, were you having them then? A. Yes.

Q. Whether they were more severe or less severe? A. They seemed to get worse all the time.

Q. After you had one, what was the effect of it upon you? A. Well, I would always be lame and sore, and weak. 80

Q. Were you able to work after you had one? A. No.

Q. How long would you have to rest? A. Sometimes three or four days or more.

Q. And did you work during that period whenever you were able to? A. Yes.

Q. You were living at home with your mother? A. Yes.

Q. Do you know how much you averaged to make a week during that time? A. Well, I never kept track of it. 81

Q. What is your best judgment on it? A. Oh, probably ten or eleven dollars a week.

Q. Was it enough to pay your board? A. Just about.

Q. Sometimes were there weeks you wouldn't get any pay? A. Yes.

Q. Did you pay your mother board that week? A. No.

Q. What was your arrangement with your

89 mother on your board and such things as that?
A. Well, when I had the money to pay it, I paid her, and when I didn't have it, I couldn't pay her.

Q. Did you pay her as much as you earned?
A. Yes.

Q. Finally you got through there and gave up altogether, did you? A. Yes.

Q. Were you forced to give up? A. Yes.

Q. They asked you to get through, did they?
A. Yes.

83 Q. And do you know why that was? A. Yes.

Q. Why? A. On account of my condition.

Q. And was that because of your nasal condition or something of that sort? A. Yes.

Q. Now, after you got through, what did you do then? A. I went up to my sisters' and stayed three or four months.

Q. During 1919 and 1920 were you calling on Dr. Hunt there? A. Yes.

Q. Do you know how frequently you saw him?
A. Well, I saw him a number of times; I don't
84 know just how often.

Q. I think you testified when you were on the stand before, you didn't know for what he did treat you. Do you now know for what he treated you? A. Nervous trouble; bronchitis.

Q. And that was right along during the years 1919 and '20? A. Yes.

Q. Did you describe to the doctor what was happening to you? A. Yes.

Q. And as a result of that, he treated you for some nerve trouble? A. Yes.

N. H. Lumbra, for Plff., Direct.

Q. Do you know when you last saw Dr. Hunt? 85
A. I think it was in 1921.

Q. And when you got through with Nelson Hall you say you went up to your sisters' on the farm? A. Yes.

Q. Where was her place? A. At Montgomery.

Q. How long did you stay there? A. Three or four months.

Q. Did you work there? A. Well, I helped around some.

Q. Did you get any pay for it? A. No. 86

Q. Did the rest there change your condition any? A. It didn't seem to.

Q. What did you do after those three or four months? A. Came to St. Albans.

Q. Did you get employment there? A. Yes.

Q. What doing? A. With the Railroad Co., Central Vermont.

Q. What was your work with the railroad when you first went in there? A. I was a helper, a machinist's helper.

Q. Through whom did you get your position 87
there with the Central Vermont? A. Well, it was one of the foremen hired me there.

Q. Who was it? A. I think it was Mr. Ackerman was the one that hired me.

Q. Did you see Mr. Noell in connection with getting it? A. Not when I first went there to work, he didn't hire me.

Q. What was your work there first? A. Machinist's helper.

88 Q. In what department? A. The locomotive department.

Q. Do you remember the date you started in? A. Sometime in July, I think.

Q. How long did you stay on there with the Central Vermont that time? A. Well, I stayed about a year, I guess.

Q. And how long did they keep you on as machinist's helper? A. Not quite a year.

Q. How was your employment during that period, steady or otherwise? A. No, it wasn't
89 steady.

Q. Do you know how much time you lost? A. Well, I lost considerable time.

Q. After your machinist's helper's work, what did they put you on next? A. As laborer.

Q. In the same department? A. I went to work across the road in the car department after that.

Q. You were out of work there from June to November that second year, were you? A. Yes.

Q. Did you do anything during that time? A.
90 Yes.

Q. What did you do? A. I worked for the Boston and Maine.

Q. Where? A. At Mechanicsville, New York.

Q. How steadily did you work down there? A. I didn't work any more there than I did to the Central Vermont,—I couldn't.

Q. Did you have a full week any of the time down there? A. I hardly think so.

Q. You stayed there until November? A. Yes.

Q. What happened to you then? A. I had to quit.

Q. Did they tell you to? A. Yes. 91

Q. Do you know why? A. Yes.

Q. Why? A. On account of my physical condition.

Q. Was there something about your work that brought on A. I lost so much time that they said they couldn't keep me.

Q. Did you get work again for the Central Vermont when you came back? A. Yes, I did.

Q. Where did they put you this time? A. I worked in the car department.

Q. What was that lighter or heavier work 92
than you had before? A. That was lighter.

Q. What was your type of work in that department? A. Laborer.

Q. How long did you stay at that? A. Well, I was there from '24 to '26 I think, in that department.

Q. Did you stay as a laborer all the time, or did they change you? A. They changed me once to a helper, but never long; they set me back again.

Q. Did you do some janitor work in the de- 93
partment? A. Yes.

Q. When did they put you on that? A. That was in 1926.

Q. What did you have to do as janitor work? A. Well, sweep up around the office and take care of the lavatories.

Q. Were you able to work doing that work? A. Well, some of the time. Not all the time.

Q. Did you lose time? A. Yes.

Q. Do you know how much you lost? A. I

94 don't know exactly how much but I lost quite a lot of time.

Q. Did they finally transfer you again? A. Yes.

Q. Where did they transfer you to? A. To the Motive power department.

Q. What were you put doing there? A. Night watchman.

Q. How long did you stay on that? A. I wasn't on that only a couple of months, I guess.

Q. Did the Company transfer you again? A.
95 Yes.

Q. Why? A. I wasn't working steady enough to keep me on that job.

Q. From the night watchman work, what did they put you on next? A. Put me on sweeping up around the shops; doing light work; odd jobs.

Q. Was that the work you stayed on until you got through? A. Yes.

Q. So you kept being transferred from one department to another and from one type of
96 work to another in these various departments? A. Yes.

Q. During all that time you have testified? A. Yes.

Q. At any time did you go from light work to heavy work? A. No.

Q. Was it always from something fairly heavy to something lighter? A. Yes.

Q. And whether or not these changes improved your condition any? Were you able to work any better or any steadier? A. No.

N. W. Lumbia, for Plff., Direct.

Q. And finally something happened, did there? '97
A. Yes.

Q. What was it? A. I had one of those spells in the shops and went unconscious.

Q. What year was that? A. 1929.

Q. You have told the jury about these spells up until the time you went to work for the Central Vermont Railroad. Now, describe your physical condition and how this was working on you from the time you started in at the railroad down to this period. A. It kept getting worse until I started getting unconscious in them until the '98
latter part of '22 or first of '23.

Q. That is the first time you went unconscious? A. Yes.

Q. Do you know how long you stayed that way? A. What? Unconscious?

Q. Yes. A. No, I don't.

Q. Do you know where you had this first spell? A. Home.

Q. And did you injure yourself any at that time when you went into it? A. Well, I fell on the floor; it hurned me up some; bruised me. '99

Q. Lose any time at that time? A. Yes.

Q. How many days? A. Three or four days, I guess.

Q. From this time on, how about these spells? Tell us. A. They kept getting worse as time went on; they kept growing worse; more severe.

Q. How about their frequency? A. I had them more often too, harder.

Q. Had you any warning they were coming at this time? A. Sometimes I would and sometimes I wouldn't.

100 Q. Tell me what the warning was? A. I used to get those terrible pains in my head; might have them for a day or two, and this time that they found me, unconscious, I didn't have any warning.

Q. You didn't have any more of that pain? A. I didn't have any warning at all.

Q. Did you have any of these spells while you were at work for the Railroad on your work up until that time? A. Not that I know of, only that time I lost my job.

101 Q. What did you do if you had the warning of them? A. I used to go home.

Q. What did that mean with regard to your work? Did you go back to work right off? A. No, I would go back when I felt better.

Q. Tell us how much time you would lose? Tell us about your employment and how that affected it. A. I might have one of those spells and probably have three or four in succession; that is, a series of them, and probably wouldn't go back to work for three or four days or a week,

102 and sometimes longer.

Q. Sometimes shorter? A. Sometimes, yes.

Q. Was there any period that you were not subject to these spells from the time you started becoming unconscious? A. No.

Q. Now, did the other men in the shops take time off the same as you did? A. No.

Q. And what was the attitude of the Company toward you and your employment there? A. They were very good to me.

Q. How about the other men,—what was the

men's attitude there? A. They were very good 103
to me too.

Q. And did they help you with your work? A. Yes.

Q. Tell us about that. A. Well, if I had anything that was a little hard for me to do, they would help me to do it.

Q. How often did that happen? A. Well, practically every day.

Q. How about your hours? Did you always report at the same time for work? A. Not al- 104
ways.

Q. Any complaint if you come in late? A. No.

Q. And how about your hour of getting through? Was that the same? A. Just the same.

Q. Was it always the same hour that you finished work? A. Well, unless I had to go home during the day.

Q. When you went home during the day, was there any complaint by the Company over that? 105
A. No.

Q. Did you ever have any trouble with the Company in any way, shape or manner over your working or the unsteadiness or anything of that sort? A. No.

Q. During this period were you able to earn anything to support yourself? A. Not all the time, no.

Q. Did you have to get help? A. Yes.

Q. Where did you get that help? A. From the American Legion.

106 Q. What type of help did they furnish? A. They furnished groceries and wood,—paid my rent.

Q. Did you have medical attention for these spells of yours? A. Before I had these spells?

Q. No, during the time you were having them? A. I never had any doctor until 1926.

Q. How did it happen you started getting doctored then? A. The Veterans Bureau sent me to Dr. Herman.

Q. From then on has he seen you right along?
107 A. Yes.

Q. What does he call these spells of yours? Epilepsy.

Q. Does he do anything that relieves them? A. There is nothing which you can do, I guess. He gave me luminal.

Q. What does he say about that,—does he say he can relieve them?

Mr. FitzGerald: I object to what the doctor says.

108 Mr. McNamara: The doctor's statement about what is ailing him and what he can do is certainly material.

The Court: That is hearsay evidence.

Mr. McNamara: That doesn't come under the hearsay rule. A man may tell about his physical condition,—what he learned from the doctor, without being hearsay. He may base his own knowledge of his own condition upon what he learns from medical advices. We will have the doctor as a witness, so we won't stress that.

Q. The doctor has given you some drug, has 109
he? A. Yes.

Q. Do you know what it is? A. Yes.

Q. What is it? A. Luminal.

Q. Have you taken that right along? A. Yes.

Q. Has that affected your condition any? A. I don't think it done it much good.

Q. Do you see any improvement? A. Perhaps I haven't had as many spells as I would if I hadn't taken it, but have had plenty as it was.

Q. How often have you had them since you started treating with Dr. Herman? A. I have 110
had as high as six or seven inside of twenty-four hours.

Q. How do you feel after you have spells or a series of them that way? A. I feel all broken up,—lame and sore.

Q. How long would you stay that way? A. Probably three or four days or a week.

Q. In March, 1929, was the time you had the spell at the shop? A. Yes.

Q. Did you have any warning of that one? A. 111
No, I didn't.

Q. Do you know where you were when you fell? A. No, I don't.

Q. How were you that morning? Had something happened at home before you came to work? A. Yes.

Q. What happened? A. I had six spells.

Q. What time did they start? A. Around six o'clock.

Q. And how long did they continue? A. About seven.

112 Q. What time did you go to work? A. I went in at eight o'clock.

Q. What time did you have the spell on the job? A. About nine, I think.

Q. Where were you when you came to? A. In the First Aid room.

Q. Who was there? A. Dr. Davidson.

Q. What was done for you? A. Well, I guess they couldn't do much just wait until I came to, and I was taken home.

Q. You were taken home then? A. Yes.

113 Q. Did your employment with the railroad end at that time? A. Yes.

Q. And what employment have you had since that time? A. Not any.

Q. Do you remember what date that was? A. That I got done for the railroad?

Q. Yes. A. It was March 28 the day I had this spell but they didn't let me go until March 4.

Q. You mean February 28? A. Yes, February 28.

114 Q. And on March 4 they let you go? A. Yes.

Q. Since that time have you tried to get other employment? A. Yes.

Q. Where? A. The City.

Q. Would they give you employment? A. No.

Q. What time of the year was it you applied for this work? A. In the summer.

Q. Were they hiring men? A. Yes.

Q. What work were they doing? A. All kinds of work.

Q. Who did you see? A. Mr. Summer, the City Manager. 115

Q. Did he give you any work? A. No.

Q. Have you tried to get other employment since then? A. Yes.

Q. Were you able to get it? A. No.

Q. Do you know why? A. Yes.

Q. Why? A. On account of having these spells.

Q. And that has been the case right along since you got through with the railroad? A. Yes.

Q. You are married? A. Yes. 116

Q. And have a family? A. Yes.

Q. I want to have you tell the jury in your own way just about how you noticed this first spell you ever had and just what the development has been in that condition right down through up to the present day. A. When they first came on me in France you mean?

Q. Yes. A. Well, I used to get these dizzy spells and pains in my head, and dizzy, and everything got black in front of me and big beads of sweat stand out on me and I would have to sit down, and they continuously got worse as time went on; gradually got worse, right up through until I began to get unconscious, and they kept getting more severe. I had them more often until I lost my job and they have continued ever since. 117

Q. Now, how do you feel as you now see this, in comparison with the way you felt—your mental and physical attitude towards things—before you went into the army? A. Well, I don't feel

118 the same. When I went in the army I was a good sound man, nothing the matter with me.

Q. How did you feel when you came out of the army? Did you feel the same? A. No, I had a depressed feeling and these spells would come on me and kept getting worse all the time.

Q. Have you ever at any time felt the same as you felt before you went in the army? A. No, never.

Q. When did you first learn that these were epileptic fits? A. Dr. Herman was the first one

119 told me.

Q. You had been having them for how long before you saw Dr. Herman? A. Three years.

Q. These spells you are now referring to are the ones in which you became unconscious? A. Yes.

Q. The other spells you had, you had back for how long? A. From the time I was in France or the hospital.

Q. Whether or not the warning that you have of these epileptic seizures is the same or similar

128 to the spells you had before you became unconscious? A. Yes.

Q. Start the same way, do they? A. Yes.

Q. Work right along the same way? A. Yes.

Q. But now there is the difference that you after a certain time become unconscious? A. Yes.

Mr. McNamara: If the Court please, I haven't asked the witness how he feels about going on cross examination.

Q. Do you want to go on cross examination

this afternoon or would you rather rest? A. I feel I would like to rest now. 121

(Recess.)

Q. Since you started being treated by Dr. Hermann in '29, have you been sent to the hospital by the Government? A. Yes.

Q. How many times? A. Seven.

Q. And how long have you been kept there? A. Anywhere from two weeks to two months. 122

Q. What hospitals have you been sent to? A. Chelsea Naval Hospital and Washington, Mount Alto.

Q. Did the Government send someone along with you as an attendant? A. Yes.

Q. And send someone after you to bring you back? A. Yes.

Q. When were you last in the hospital? A. In 1930.

Q. Whether or not getting tired has any effect on your condition? A. Yes, it seems to. 123

Q. How? A. Well, when I get tired it seems to bring on these attacks.

Q. Has that been the case right along? A. Yes.

Q. When you were working for the railroad, what did you do about rest? Did you take more rest than a normal man then would? A. Yes.

Q. How did you do it? A. When I got done work I would lie down until supper time.

Q. What time did you get through work? A. Four o'clock I got through work and I would lie down until supper time, then eat and stay there so I could work the next day.

124 Q. What was that, a regular thing? A. Yes.

Q. How have you been since you had this trial about a month ago, have you had any of these spells? A. About fifteen.

Q. When did you have the last one? A. Day before yesterday.

Q. Have you had more than one of the same series? A. Yes, five or six.

Q. What day was that? A. That was a couple weeks ago.

Q. And over how long a period did these five
125 or six fits last? A. Over probably ten or twelve hours.

Q. Now, since you left the army in 1919 do you know of any work you have been able to do that you could work at steady enough to earn a livelihood? A. No.

Q. You have tried just as much as your condition would permit, have you? A. Yes.

Mr. McNamara: I think that is all.

(Cross examination put over until tomorrow.)

126

WALTER E. BELL, called as a witness by the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. McNamara:

Q. You live in St. Albans? A. In Swanton.

Q. You are in business? A. Yes.

Q. Where? A. I have two stores, one in Swanton and one in St. Albans.

Q. What type store? A. Radio dealer and 127
electrical appliances.

Q. Were you in the same Company with Newton Lambrn during the war? A. Yes, sir.

Q. You were a corporal as I understand? A. Yes, sir.

Q. In his platoon? A. Yes, sir.

Q. Came in pretty close contact with him, did you? A. Why as close as an officer would come.

Q. See him pretty frequently? A. Yes.

Q. How often? A. Well, at the beginning of the war you would see him night and morning at 128
least. You would put him out on post duty. You might not be in the same dugout but you were in contact with him during the twenty four hours.

Q. That is your relationship to him during the period down to the time he was injured, was it? A. Yes.

Q. What kind of a soldier was he? A. Well at the front I cannot exactly say, discipine is disregarded in some respects on the front; you are put out and left there. He was always at his 129
post until relieved. I would say a good type of soldier.

Q. Do you know of his having any physical disabilities or troubles during that period? A. No, sir.

Q. Do you remember the morning he was injured? A. Yes, sir.

Q. Did you see him that morning? A. Did I see him that morning?

Q. Yes? A. I did not see him that morning.

Q. Did you see him after he was injured, in the dugout? A. Yes, sir.

130 Q. What was his condition when you saw him there? A. Well well, after this battle this barrage that is, why, of course, we come back at different times. I was out longer than he was, and I come in about well, I came in in the afternoon sometime and they were in the dugout working on him. He was in the dugout.

Q. You knew in that way he had been injured? A. Yes.

Q. Do you know the time of the morning he was injured? A. He was injured in the same
131 attack we all had to go back in, he went out of the dugout possibly the same time we did. He was out on duty all night the same as I was on, and on coming back to the dugout, which was supposed to be the evening's work completed, this barrage came unexpected and the attack made, and no exchanges whatsoever, and no meals and we have to return, and in the return we start back for our positions, and just as we left the entrance to the dugout for our positions, those big shells, or in other words, the barrage
132 was arriving at your, and of course you start for your position and those that got there in my travelling I travelled direct to the left on leaving the dugout, he might have travelled a different direction, but in my travels the barrage was so extensive in several instances I was pushed down, and naturally I wouldn't be watching where somebody else was going.

Q. You went through the same barrage or bombardment and was not injured? A. Yes, sir.

Q. Were there some others injured in that bombardment? A. Yes, sir. 133

Q. Did you see the crater made by the shell that threw him? A. I wouldn't say the crater; I saw several of the craters.

Q. In that immediate vicinity? A. Yes.

Q. What kind or size was made there? A. Depending on the shell, I should judge that morning the shells coming at the troops that morning was what they term a 157 millimeter, which would, in terms of size, would be about the size of the ordinary stove pipe. 134

Q. That is that big around? A. That size.

Q. And how long a shell? A. They run 12 to 14 inches, the iron part of the shell, and when they enter into the ground, some have primers on the end so they break immediately; others penetrate after they hit and then break. They left craters twenty to twenty-five feet deep with a ending across of twenty to twenty-five feet in diameter.

Q. Did you see several such holes or craters that morning? A. Yes. 135

Q. Was it a pretty general shelling you got there that morning? A. Yes, it was.

Q. Did you see the effect of this bombardment on some of the men, just what happened to them? A. Yes.

Q. Describe that to the jury.—

Mr. FitzGerald: I object to him describing anything that does not relate to Mr. Lumbra, as being immaterial and irrelevant.

136 The Court: Why not, to show its severity or mildness?

Mr. FitzGerald: It might have killed twenty-five men and not affect Mr. Lumbra.

The Court: As showing the severity,—whether much or little,—powerful or mild.

Mr. McNamara: It is our contention this shell did not strike him, nor any fragment but shells exploding that way had a peculiar action in causing a curious con-
137 cussion. Some men were decapitated entirely,—blown to pieces, although nothing hit them. This man was there and saw this happen.

Mr. FitzGerald: Exception?

The Court: Yes.

Mr. McNamara: This, of course, will be in connection with the plaintiff's testimony he was thrown forty feet, as to whether or not that is probably so;—corroborating that fact.

138 Q. Go on and describe to the jury the bombardment and the concussion effect of these shells. A. Well, on leaving the dugout entrance—directly after we come in we got notice we have got to go back,—the minute we left the dugout this particular morning, as we start for our positions that were our positions in the trenches a few hours previous, we find on leaving the dugout we are all in the midst of the bombardment and we have got to take our best course to get to what I call our positions. We have got to get

in there and set up another gun to prohibit the enemy from coming, and on the way over to the position I was travelling with another soldier from this same territory and several others from a different territory, and in trying to get at the position that is the most serious, on the way over we deliberately got throwed or pushed down several times with this terrible force of the shells breaking. If the shells break close to you they will take your life without possibly any notice whatsoever to you. Shells that whistle by you, you have no fear of; you can hear them and know about where they will land from you. Other shells that strike within twenty-five or thirty feet from you will push you and throw you from the force of the shell but might never injure you,—which we have all had that occasion,—us fellows that have been there, to be throwed.

Q. How far did they throw you? A. Several feet; twenty-five or thirty feet, and still not hurt you. If they're still further away they might tear you up from the fragments of the shell. They break in an arch form, and if you are in the half way distance of the arch, you will feel just the concussion, which in my own instance I have been several times forced deliberately on my face, and with my eyes closed as hard as I could close them, still see the flash and still be uninjured. If you were further away you would be torn from the fragments of the shell. These boys that went with me this particular morning,—we have one,—I don't see him here but he could be brought here,—and he was covered up completely,—just his

142 head remained above the trench, from one of the shells breaking. His head was above the trench. There was no harm done to him but the concussion, caved the trench in on him. We remained in this position and had to stay there in my particular position until after things quieted down. This happened in the morning about nine o'clock. We had to remain there because—a few had caved into the dugout,—but the enemy's plane was above us and it was taking photographs of the damage it had done. We couldn't make any
143 change in our position,—we had to remain there, —so when I did leave this position to enter the dugout was the time I saw the casualties, which we became hard-hearted to,—and I saw Mr. Lumbra for the first time, being worked on.

Q. You knew he went back to the hospital? A. I knew he was evacuated that night.

Q. Do you know he was away for sometime after that night? A. Yes I knew because I later took charge of that platoon and he was put back in my platoon.

141 Q. Did you have some men in your outfit who underwent this type of concussion that developed into mental cases while with you there in the service?

Mr. FitzGerald: I object—too highly immaterial and irrelevant.

The Court: That shows whether others were similarly affected.

Mr. FitzGerald: I lost an ear over there and others were not injured at all. That would not indicate they suffered injury.

The Court: I think I will let that go in. 145

Mr. FitzGerald: Exception.

Q. Tell us about that. A. Yes, it has happened to several within our Company that we have had experience with. The first Vermonter killed in the World War was killed by concussion and he was not hit by any fragments of shells.

Q. Did some of them develop insanity or marked mental trouble? A. In this particular case he was killed instantly, and others in the Company I believe are drawing compensation for 146 injury; they were shell-shocked at the time and had to be relieved.

Q. You remember that? A. Yes, sir.

Q. Did some of them after being affected, ever rejoin the Company again?

The Court: I wouldn't go into that.

Waived.

Q. After he was evacuated to the hospital did you later know he was back with the outfit? A. Yes, sir.

Q. In what capacity? A. He was at the rear. 147 A machine gun company, you understand, has its guns at the front and we have a detachment of mules which we call—the artillery calls them caissons,—they are a light craft with a mule hitched to them, that draw the guns to and fro from the front and come as near to the front as they can with rations and stuff. That is a class of light duty,—the "mule skinner,"—he can ride. The kitchens—they stay back different distances according to the lay of the land; they might be

148 with five or ten miles from the front, it depends on the lay of the land, and we knew he was there because we had to send men back from the front line, and he knew who the cooks were at the rear. Naturally I had to know who the mule skinners were when I had to be moved.

Q. You knew he was back there doing that type of light duty? A. Yes, sir.

Q. Did that indicate anything to you whether or not he was under some disability, the fact he stayed back there and was not sent back to his
149 guns? A. It had some effect because every day when we had casualties we called for men and if they have any experienced men at the rear, they will not furnish us inexperienced men. If he was capable of coming back to the front, they would have sent him back.

Q. Do you know if he ever came back and was in the line doing that type of work again? A. I don't believe I can recollect of ever having him on the firing line again.

150 CROSS EXAMINATION by Mr. FitzGerald:

Q. What date was it, Mr. Bell, that Mr. Lumbra received this injury? A. According to my company history which I had on file, it was June 16 or 17.

Q. In the morning of that day, where were you? A. The morning of that day—it is hard for me to answer, because it was a continuation of the night before. You understand I am in these trenches during the darkness;—I have come back to the dugout at the break of day, and

on entering the dugout, immediately, without any 151
signs of any warning at all, we are ordered back. That is the day of the injury, when the biggest bombardment was handled. On leaving immediately to go back was when the major part of this battle was had.

Q. Were you on outpost duty that night? A. It was trench warfare.

Q. How deep a foot? A. Six feet.

Q. On what front? A. What we called the Neuve Maroenin(?).

Q. Six foot trenches? A. Six foot trenches. 152

Q. Where was your dugout located? A. Our dugout? If you could go directly over land, approximately two hundred feet to the rear.

Q. Of the trenches? A. Of the trenches.

Q. What kind of dugouts were these? A. These were large, deep dugouts, around seventy-five feet below the surface of the earth.

Q. When you returned on the afternoon, I believe you said, of June 16 or 17? A. Yes.

Q. You saw him in the dugout? A. Yes.

Q. What were they doing with him? A. He 153
was in sort of a condition—he was lying on his bunk and they were working on him. He had one foot out from the bunk,—the shoe was removed, and he had been bandaged and was awaiting removal order.

Q. Was he conscious or unconscious? A. He was conscious.

Q. They were not working on him? A. Yes, the boys who was staying there; there's other boys with other injuries about him, consoling

him, telling him he will be all right, and so on. I, myself, and the other able bodied men who have got to go back, don't get interested in the wounded because of the hardships we have still to continue, because we are not concerned.

Q. You are not the least bit concerned with a fellow soldier? A. We very seldom say anything to him whether wounded or unwounded. You take care of yourself.

Q. That is also the case when in a seventy five foot dugout? A. Yes.

Q. Yet you have a complete recollection of Mr. Lambra's condition, but you didn't talk with him? A. I didn't talk to him but there's other incidents in the dugout that makes the incident well known.

Q. You spoke of this barrage that came over. What's the first thing you do when you hear a shell come? A. What's the first thing you do when you hear a shell come?

Q. Yes. A. Well if you are out there in the position, when you hear a shell come, you cannot term it as such, as one shell, you hear the shells, hundreds of them, passing you, they go by with a nice little whistle, and if your can hear them whistle you know they aren't going to injure you; it is one that isn't going to whistle is the one that is going to label you.

Q. You testified you could tell whether they were coming within twenty or twenty five feet of you, where they were going to land? A. No, I didn't testify to that.

Q. Isn't it a fact after you have been in the

front a little while, you can tell within twenty five feet where they are going to land? A. No, sir. 157

Q. Isn't it a fact you "duck" the first thing? A. It is right, you do.

Q. If you don't know where it is going to land, why do you "duck"? A. I can't tell you where the shell's going to land.

Q. Why do you duck? A. Simply because you are not brave enough to stand up.

Q. Is it a case of cowardice? A. No, but what does any man do when you know that? 158

Q. It is a case of protection? A. I would say it is just a case of "afraid". I wouldn't say a coward, but would say "afraid".

Q. Have you ever ducked? A. Yes.

Q. You don't think it is cowardly? A. No.

Q. You know everyone ducked if they got a chance? A. Yes.

Q. It wasn't cowardice? A. No.

Q. They ducked because they were coming so close? A. I tell you I don't know if it's going to land twenty feet from them. 159

Q. You spoke of 157 millimeter. Is there any mistake that might be 155? A. 155 is the American, 157 is the German; quite certain I am.

Q. The 157 is comparable with what in inches? A. I would say it would be what we would call the six inch.

Q. A six inch shell, wasn't it? A. A six inch shell.

Q. What kind of soil was on that front that day? A. Sandy soil.

160 Q. Very sandy? A. Very sandy soil.

Q. You told about going out with this group to the left, and Mr. Lambra went to the right? A. I am not sure.

Q. You are sure he went out? A. Yes, I am sure he went out.

Q. This crater you referred to, do you know whether that is one that was caused by the shell Mr. Lambra received an injury from? A. I do not.

Q. You don't know anything about his injury
161 except you saw him in the dugout? A. That is all sir.

Q. You testified after this occurrence Mr. Lambra returned and was put in your platoon, didn't you? A. Yes, sir.

Q. Did you have occasion to go back to the echelon from time to time? A. No, sir.

Q. You only knew he was back there? A. I knew he was back there when we moved out, the only time I have occasion to go to the rear.

Q. What was he doing? Was he a "mule
162 skinner" as you term him? A. I don't know what their duties back there are; who takes care of the mules and who takes care of the kitchen. On my list he was supposed to be in the kitchen but I don't know what his duties were.

Q. By the way, how long was he absent? A. I couldn't tell you.

Q. Was it a couple days or a couple of weeks? A. Absent from the time he was injured until he came back?

Q. Yes. A. Changing men so much it isn't safe for me to say. It was months.

Q. A period of months? A. A period of 165
months.

Q. During his absence, who did the duty which he did upon his return to the outfit? A. Well we have casualty troops or we have troops that kept coming in and filling up. Every battle when we lost out, or eight or ten wounded, we have a replacement; we call for them and they bring up new men. On this particular front—it is possible,—trench warfare,—we didn't replace. As I recollect, we didn't replenish the front.

Q. You misunderstand me. Who did this light 164
duty he did after he returned, who was doing it during his absence? A. I don't know as I can name the party, but I think I can; a man by the name of Drew.

Q. He did that work while Lumbra was absent? A. I think so.

Q. You referred to getting replacements. What method did they have about getting replacements? A. I don't know what method they had back at the rear. All I had was to issue the same as I would rations,—call for so many re- 165
placements. My rank was corporal—acting sergeant for this particular sector, and later sergeant—acting lieutenant.

Q. Who asked for the replacements, the noncom or the officer in charge? A. We didn't have any officer in charge, if you please.

Q. Never had? A. Not at this period.

Q. How long a period were you without an officer? A. At this particular front, the Captain or the man in charge of the Company, is at the

166 rear. There is no what we would call other than non com officers at this section at the time of this battle.

Q. Who was the ranking non com at this time? A. I think a party by the name of Porterville(?).

Q. Would you make your request to him or each platoon move on and get them as best they could? A. At this particular front I notified him that he wouldn't send any further commands if he didn't leave the dugout and do likewise
167 with the rest of us.

Q. To whom were you referring? A. To the sergeant in charge.

Q. You were not in charge of the platoon at that time? A. I was not.

Q. You ordered the replacements or requested them? A. I requested them of him and forced the order through.

Q. What action was taken after that you don't know? A. I do not know.

Q. You don't know whether they had exper
168 ienced men back there or not? A. No.

RE-DIRECT EXAMINATION by Mr. McNamara:

Q. But you do know if they had experienced men who were able to come, they would have come? A. At that particular front all our Company was at the front,—all but the officers.

Capt. R. H. Pollard, for Plff., Direct.

CAPT. R. H. POLLARD, called as a witness 169
by the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. McNamara:

Q. At the present time you are Captain of the National Guard at St. Albans? A. Yes, sir.

Q. Were you with Mr. Lumbra in service? A. Yes, sir.

Q. What was your rank? A. Sergeant.

Q. Were you on the Xereny front? A. Yes. 170

Q. At the time of the bombardment he and Mr. Bell testified to? A. Yes.

Q. Do you remember that affair? A. Yes, sir.

Q. Whether or not it was rather a severe bombardment, was it? A. It was.

Q. What type of shell was it, or different types? A. Different types. I wouldn't dare to say, some large and some field artillery.

Q. Did you see the craters in this vicinity between the dugout and the trenches? A. I didn't 171
see that particular dugout. I see plenty of craters.

Q. How sizeable were they? A. Why, they varied in size, depending upon the formation of the land. If it happened to be soft earth, a large shell might penetrate perhaps twenty-five feet. If it was hard earth, they would just "plop" on top and you wouldn't have much of a crater.

Q. What was the general condition of the soil around there? A. Why, that varied too.

172 Q. How deep and wide was the largest crater made there or that immediate vicinity? A. I have seen craters you could put half of this room into.

Q. Right in this locality? A. In that vicinity, yes.

Q. Now you knew Taunbra from the time he joined the Company at Fort Ethan Allen, did you? A. I saw him when he was brought down there as a recruit.

Q. What was his physical appearance at that
173 time? A. He appeared like a nice, husky country boy just brought down; full of life and pep.

Q. You kept in contact with him during the rest of the time he was in the Company? A. I did up until going overseas.

Q. Was there any change in his condition during that period? A. Why only through training. It developed him in physique; he was quite apt; got along first rate.

Q. Did you see anything of him in his work
174 overseas? A. Occasionally.

Q. Did you see him the day that he was evacuated to the hospital? A. I don't think so.

Q. Did you know just what his line of duty was up to that time? A. I know he was just a man in the squad; probably a mechanic or an assistant gunner.

Q. Did his duties require he be with the gun? A. Yes, sir.

Q. Where were the machineguns placed? A. They're out in commanding positions to command approach from the enemy.

Capt. H. H. Pollard, for Plff., Direct.

Q. Very often in front of the front lines, were they? A. At different times, yes. 175

Q. Where were the machine guns placed? A. The whole crew have to stay there with it, was that their assignment? A. Yes, to service the gun.

Q. You had been through three or four engagements before the Xerney front? A. I had been with the organization throughout.

Q. I mean the organization had been through three or four active engagements before this? A. Yes. 176

Q. Did you see him from time to time during this period? A. Yes.

Q. Any change in this period, or did he stay about as he had been? A. No, I didn't see any change in him.

Q. You learned he had been evacuated to the hospital? A. Yes, sir, from seeing the records or something.

Q. Did you know why he had been evacuated? A. Yes, I saw it through the orderly room. I was quite familiar with the First Sergeant. 177

Q. You learned in that way from the records why he had gone back? A. Yes.

Q. Why was it? A. A wound; a casualty.

Q. Do you know how long he was away? A. He came back after Chateau Thierry, sometime in August.

Q. When did you come out from Chateau Thierry? A. Around the 29th day of July.

Q. It was some little while after that you knew he was back with the company. From then on

178 you were in the Meuse-Argonne, were you not? A. Yes.

Q. And in the St. Mihiel drive? A. Yes.

Q. And in any others? A. No, I went with the organization throughout its engagements.

Q. And the 26th Division stayed in active combat throughout the war? A. Up until November 11th.

Q. Did Lumbra come back to join his outfit at the duty he had had before he went to the hospital? A. No, he was put on what we call
179 light duty.

Q. Did you see him from time to time? A. Yes.

Q. Had his appearance changed? A. Well I would say that it had.

Q. In what respect? A. He seemed to be slow; he didn't seem to care; wanted to poke around; didn't care to be neat or anything else.

Q. Was that quite a marked change from what it had been before this time? A. Yes.

Q. Whether or not he stayed that same way
180 during the rest of the time you were in France? A. I couldn't see as he improved any over that.

Q. How was he about getting around after he came back from the hospital? A. I didn't see much outside of the kitchen. I just see him poke around,—peel potatoes, and things like that; not look very good.

Q. Did you ever see him do any heavy duty from then on? A. Nothing, only perhaps load his kitchen; assist in the kitchen; as a helper in the kitchen work.

Q. Have you known him since he got out of service? A. Yes. 181

Q. And how has his condition been since then, do you know? A. It wasn't too good in the last two years.

Q. You simply know him in the last couple of years? A. That is in a way through the American Legion.

Q. But you haven't had any intimate acquaintance with him so you would know just what he has been doing since he got out of service? A. No, sir. 182

Q. When he came back and was discharged at Camp Devens and returned home, tell us, as well as you can, how he appeared in comparison with the way he appeared when you saw him come down to Fort Ethan Allen to join up with the army? A. I won't attempt to say.

Q. Was there a change? A. If I look back at it that way I would say there was a change.

Q. Just how was it different? How much of a change? A. I couldn't say how much but when I saw him as he entered the service as a recruit, when he came down for recruit drill, he was a husky lad,—looked like a country boy, full of life,—ready to do anything, and the way I saw him on board ship, he didn't care much what happened. 183

Q. Listless? A. Just listless,—lifeless.

Q. Any different look to his face? Had his expression changed? A. Why I wouldn't dare to say; his eyes didn't have any life; I cannot say that the—, the boy didn't appear the same any how.

184 Q. There was some marked change but you don't know just what it was? A. Yes.

Q. Did you see some shell shocked men during your experience? A. Yes.

Q. Was he of that same type? A. That is what I attributed it to.

Q. That is the army designation of a man of his type? A. Yes.

Q. By the way you are at the present time in the employ of the United States Government as a Customs Inspector? A. I am.

185

CROSS EXAMINATION by Mr. FitzGerald:

Q. How heavy was Mr. Lumbra when you saw him in 1917? A. I would say he was a lad around perhaps 135 to 50 pounds; well built.

Q. Might he have been much lighter than that, Captain? A. I hardly think so. One little incident that was brought out, I saw him in two or three scraps; that is, with the boxing gloves around the Company Street, and I thought he was a pretty husky lad.

186 Q. Your recollection of him is a man about 135 to 150, is that it? A. Somewheres around there.

Q. When he went into service in '17, Captain, on this front where Mr. Lumbra received an injury, what was the—where were you that night? A. I was over farther to the right I think. I was on the right of the town.

Q. Where was Mr. Lumbra? A. He was on the left of me, in the second platoon.

Q. About how distant were you from that position? A. Possibly three hundred yards.

Q. These trenches, Captain, what were they like? A. The trenches in our particular sector were down front; we were on commanding ground, supporting—that is, we were shooting over head fire over our sector of the trench. 187

Q. Did they have trenches down there? A. Yes.

Q. In the last trial didn't you testify there were no trenches? There was fox holes? A. No; at Chateau Thierry you asked me where the trenches were.

Q. I think you are right. I beg your pardon. On the evening of Mr. Lumbra's injury, what kind of a bombardment was that? Just a general barrage, is that what it was? A. No, it was the first real serious barrage that this organization had on that front. 188

Q. Was there air craft in use? A. Yes, sir, the planes were around that day.

Q. Which makes the larger crater, a six inch shell or a bomb from a plane? A. It depends on the size of the bomb used.

Q. Isn't it generally true that the bombs from the aeroplane make a larger crater than a six inch shell? A. A fifty pound bomb from an aeroplane would make about exactly the same size. 189

Q. If it was a 150 or 200 pound bomb, it would be larger? A. Yes, I believe it would.

Q. This crater you saw in France you could probably put half this room in, what size bomb or shell do you think caused that? A. It depends on what the ground was.

W. E. Bell, re-called, for Plff., Re-cross.

190 Q. You saw it; you know. A. I saw several of them.

Q. What size? A. I don't know what size the shells are; no man knows exactly the size of the shell unless he picks up the fragment.

Q. On this front Mr. Bell testified was very sandy soil. What size crater would a six inch shell probably make there? A. I wouldn't attempt to say.

Q. Isn't it true, the more sandy the soil, the more shallow the crater, whereas in solid
191 ground, not too hard, of course, the crater will remain larger? A. There is no resistance; the shell will penetrate to a greater depth.

Q. And the upheaval will be greater, won't it? A. It would.

WALTER E. BELL, re-called.

Re-cross Examination by Mr. FitzGerald:

192 Q. Did Mr. Lumbra make any complaint to you after he returned, about being in poor health? A. After his—

Q. After he was evacuated and returned to the outfit? A. No, sir.

Q. Have you been associated with him since the war? A. No, sir.

CORDES M. FOLEY, called as a witness by 193
the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Sylvester:

Q. What is your full name? A. Cordes M. Foley.

Q. Where do you reside? A. Swanton, Vermont.

Q. How long have you lived there? A. Six years. 194

Q. Previous to moving to Swanton, where did you live? A. Montgomery Center.

Q. What is your present occupation? A. Engineer in the Highway Department, State of Vermont.

Q. How long have you been so employed? A. Since 1922 steadily.

Q. Have you been employed by the State of Vermont since 1922? A. Yes.

Q. Do you know Newton Lumbra? A. I do.

Q. How long have you known him? A. Well 195
since he was a very small boy. I wouldn't attempt to say in years.

Q. You were living in Montgomery the same time he was? A. I lived there,—yes.

Q. Did Mr. Lumbra work for you at some time? A. He did.

Q. Describe to the jury his general appearance and his activities before he enlisted. A. Well I considered him a normal, healthy boy; a boy full of fun and jokes and this and that; as all

196 the rest of the young men around town that were of the same disposition and nature. I considered him, as I say, strong and healthy.

Q. Was he active all the while? A. Active.

Q. Did you know anything about his employment before he enlisted in the army? A. I wouldn't want to state in particular, give dates and so on. I know he worked for me in haying and afterwards worked for the Nelson Hall Co.

Q. Describe the manner in which he did his work for you in haying? A. Satisfactory.

197 Q. Did there come a time when you heard he enlisted in the army? A. Yes.

Q. Can you recall about when that was? A. Yes, I think it was in '17.

Q. Do you also recall the time when he came home? A. I do.

Q. How soon after he arrived home, did you see him? A. I wouldn't attempt to say that; possibly within a week; may be within a day.

Q. Did you notice a marked change in regard to his appearance after he arrived home? A.

198 Why, he was soberer and slower.

Q. Go ahead and describe in detail to the jury how his appearance impressed you. A. Well he appeared older,—in other words, a great deal soberer in his actions and so on and so forth. I think his face was a great deal more flushed than it was before he enlisted.

Q. Was he as active as he was before? A. I never saw him as active.

Q. What do you mean? A. I never happened to see him when he was fooling or scuffling or anything of that sort afterwards.

Q. Did he appear to you to be a man that had undergone some hardship or something drastic had happened to him? A. Well as to his hardships or anything of that sort, I cannot say. He appeared to me slower and soberer, I will put it that way; different. As to his hardships I probably was told by him about all that. 199

Q. Would you say this condition that you have described was due to the fact that he was older when you saw him or would you say it was more than that? A. No, I wouldn't say it was on account of age. I would say it was possibly from what he had been through. 200

Q. Did you notice any difference in expression on his face? A. I noticed his face was flushed a great deal more. I wouldn't want to go into technical so and so as to his face. He appeared tired,—put it that way.

Q. Did you know of his working steady for anyone there in Montgomery after he returned? A. No.

Q. Did you know of his attempting to work at different times and places? A. I know—yes, that he did work or try to work. 201

Q. You live right there in the village, did you? A. I did.

Q. Did you notice whether he was around the village more after he returned than he was before he went away? A. He was, I think.

Q. You think he was? A. Yes.

Q. Do you know where he worked? A. After he come back?

Q. Yes. A. As I say I think I know of his working for the Nelson Hall Co. in the mill.

202 CROSS EXAMINATION by Mr. Fitzgerald:

Q. Mr. Foley, this haying you have testified to, was that before or after the war? A. Before.

Q. Did he ever work for you after the war? A. No, sir.

Q. Before the war did he work for you on other than this one occasion when he did some haying for you? A. I think he worked for me during two seasons of haying.

Q. On how many occasions did you employ
203 him? A. On two.

Q. Do you recall what years they were? A. I think it was in '13 and '14, the summers of '13 and '14.

Q. Somewhere along '12, '13 or '14? A. Yes.

Q. Do you know whether or not he worked regularly before the war? A. Well as to my making statement as to his working regularly before the war from the years of '15 to '17 I couldn't say positively. I think he did work, but
204 his occupations and so forth I don't think was regular employment, only while he was in the mill.

Q. Do you know whether or not he worked any more regularly before the war than he did after the war? A. He wasn't with me when he was working after the war, so I won't say.

Q. Do you know whether or not he did, Mr. Foley? A. Absolutely not.

Q. You do know he didn't work regularly during those years '15, '16 and '17? A. Occupa-

tions were changed necessarily and there would 205
be spaces in between; work for me haying and
then go in the woods.

Q. You testified he was around the village
more after the war than he was before. Isn't
that owing to the fact he moved into the village
after the war? A. Right after his return I
think he lived around the village.

Q. And he stayed there until for a couple
years, 1921 or '22? A. I couldn't say where he
was all those times.

Q. When did you last have knowledge of his 206
condition or do you have any knowledge of his
physical condition? A. Why, sometime in '20
or '21 he came into my house and wanted me to
make application for a pension for him and told
me all about his condition.

Q. What did he say about his condition at
that time? A. Bad.

Q. What were his ailments? A. Headache,
backache; as I remember, backache as well as
head; in back here (indicating).

Q. Did he tell you anything about having con- 207
vulsive seizures at that time? A. No, sir.

Q. Or these dizzy spells? A. Not that I remember.

Q. Didn't he complain of rheumatism as one
of his troubles at that time? A. I don't recollect that he did.

Q. You spoke about Mr. Lumbra changing
after the war. Has he changed very much since
then? Excluding the natural wear and tear of
twelve years, is he changed much today from his
appearace in 1919? A. In what respect?

208 Q. General appearance. A. Yes, he is.

Q. In what way? A. Why, he's older.

Q. Naturally. A. And I think he's in a shakier condition than he was then.

Q. What do you mean by a "shakier condition"? A. I noticed sitting here he was very shaky.

Q. In what ways? A. Hands shaking and the muscles of his body shaking when he was here on the stand.

Q. Is he heavier or lighter than he was in
209 1919, do you think? A. Well I would see him then—I should say about the same as to weight. He might be a little heavier but not much.

Q. When he came home from the army you said he was soberer? A. Yes.

Q. Isn't it true, Mr. Foley, that that was also true of many of the boys who were over there? A. Sure; yes, sir.

Mr. FitzGerald: I think that is all.

RE-DIRECT EXAMINATION by Mr. Sylves-
210 ter:

Q. You say he did complain to you as early as 1920 in regard to his pains in his head? A. He was at my house twice asking me to make application for a pension; telling me all about his troubles.

Q. Did he mention at this time about the pains in his head? A. Yes.

Q. Did he tell you how long he had those pains? A. He told me a whole lot of stuff I cannot remember distinctly now.

Q. Did you know of his working in the woods before he enlisted? A. I think he worked in the woods, yes. I wasn't in the woods with him but I know well enough he was. 211

Q. Did you ever hear any complaints of any sort from his employers before he enlisted with regard to his loafing or being unsteady? A. I wouldn't say that I did.

RE-CROSS EXAMINATION by Mr. Fitz-Gerald:

Q. What year did he work in the woods, do you know? A. I won't say,—somewhere '16 or '17; '16 I should say. 212

Q. For how long a period? A. I wouldn't say how long he did work.

Q. A few days, a week or a year or how long? A. I wouldn't say.

Q. Did you ever hear complaints if he didn't work after the war? Did any of his employers complain to you that he wasn't working right? A. Naturally wouldn't, no.

Q. Did you ever know of Mr. Lumbra drinking to excess? A. He never drank in my presence. 213

The Court: Now this is being introduced as to this man's condition?

Witness: I know nothing of his drinking.

C. H. Dow, for Pltf., Direct.

214 CHARLES H. DOW, called as a witness by the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Sylvester:

Q. Where do you live Mr. Dow? A. Richford.

Q. How long have you lived there? A. Eight years.

Q. Previous to the time you moved to Rich
215 ford, where did you live? A. Montgomery.

Q. How long did you live in Montgomery? A. Always lived there. I was born and brought up there.

Q. Did you know Newton Lambira? A. Yes.

Q. How long have you known him? A. Since about 1913 I would say.

Q. Did he at one time work under you? A. Yes, he worked, I think it was in 1916.

Q. What position did you hold at that time? A. I was foreman.

216 Q. For whom? A. The Nelson Hall Company in the veneer factory.

Q. He worked for you in 1916 you say? A. Yes.

Q. Describe to the jury what kind of a workman he was, general appearance and health and all about him. A. He appeared to be a good rugged man and his work was satisfactory. He did his work all right and we kept him on the job for six or seven months I would say.

Q. Did he work steady during that period of time? A. Yes.

C. H. Dow, for Plf., Direct.

Q. What kind of work was he doing? A. 217
Rolling logs.

Q. Was that heavy or light work? A. That was heavy work, we considered it.

Q. A job where it was necessary to have a good rugged man? A. A good strong man, yes.

Q. Do you recall the time he enlisted in the army, he among others? A. Yes. I don't, I recall the time, yes, sir.

Q. Do you recall the time he came home after being away for a period of time? A. Yes.

Q. Did he work for you after he arrived 218
home? A. A short time.

Q. When was that? A. 1919.

Q. You say a short time. Just how long a period of time do you mean by that? A. I can not remember, but I know he didn't work very long because he was unsteady and we didn't keep him on the job; we tried him in other places.

Q. How did he work while on the job? A. Not as good as before. He wasn't the same kind of a man. We put him on the same work when he came back and he wasn't capable of doing it and 219
we changed him on another job and he did that better but he wasn't steady; didn't work every day, so we didn't keep him.

Q. Was it necessary by reason of his unsteadiness, that you discharge him? A. Yes.

Q. Did he complain to you about his physical condition? A. I don't remember that he did; that was his excuse for not working, that he wasn't well.

Q. Was it apparent that there was something

220 that was ailing him, bothering him? Could you see there was something ailing him? A. Well I took his word for it, that there was something the matter.

Q. Did you see yourself some change in him? A. Yes, a change. He didn't act like the same fellow; he didn't do his work the same.

CROSS EXAMINATION by Mr. FitzGerald:

Q. What camp were you in charge of as foreman? A. Camp? No, in the veneer factory.

221 Q. He worked for you in this veneer factory? A. Yes.

Q. And what were his duties when he returned from France? A. His duties were the same; we gave him the same work to do.

Q. What month did he apply for work up there? A. What month?

Q. Yes. A. I don't know.

Q. In the spring of the year, fall or winter or summer? A. Well I think it was in the winter.

Q. The winter following his discharge from
222 the army he went to work for you? A. Yes.

Q. What had he done in between the time of his discharge until then? A. I don't know.

Q. Might it have been in the summer he went to work for you when he came back from the army? A. No, I am pretty sure it was in the winter.

Q. How long a time did he work for you in 1919? A. I cannot tell.

Q. Was it a couple days, a couple months or a couple of years? A. I might say three or four weeks.

Q. Then he was transferred to another department, was he? A. I think so, yes. He was taken from my department, yes. 223

Q. Then he was not discharged at that time, was he? A. No.

Q. And do you know what his duties were in the other department? A. No.

Q. Do you know whether or not he worked regularly there? A. No.

Q. Do you know whether or not he worked regularly for the rest of the time he stayed in Montgomery Center? A. No. 224

Q. You don't know much about him, do you? A. No.

(5:15 p. m. adjourned.)

(Tuesday, April 19, 1932, 9 a. m.)

LOUIS J. PAQUETTE, called as a witness by the plaintiff, being duly sworn, testified as follows: 225

Direct Examination by Mr. Sylvester:

Q. What is your full name Mr. Paquette? A. Louis J. Paquette.

Q. You live where? A. St. Albans.

Q. How long have you lived there? A. Over forty years.

Q. What is your business? A. Proprietor of a bowling and billiard alley.

226 Q. Did you hold some official position in the city at some time? A. I was city commissioner two terms.

Q. Are you acquainted with Newton Lambra? A. I am.

Q. How long have you known him? A. Since about 1924.

Q. Did you at sometime hold some position or office in the American Legion? A. I was Commander of the Legion from 1924 to '25.

227 Q. During the time you were Commander, was your attention called to Mr. Lambra's case? A. It was.

Q. And as a result of that, what did you do, if anything? A. I investigated the case and found out he needed help.

Mr. Fitzgerald: I object to what the investigation may develop. He may testify to what he knows but not what some one told him.

The Court: Of course, that is what he means.

228 A. (continued) which I had help given him.

Q. What did you do by the way of helping, Mr. Paquette? A. Why I had him sent to the Veterans Bureau and had him sent to the hospital and had his family taken care of for the time being.

Q. What did you do for his family? A. We bought groceries and paid his rent and bought some coal.

Q. What hospital was he sent to, if you know? A. Chelsea Naval Hospital.

L. J. Paquette, for Plff., Direct.

Q. How long a period of time did this investigation extend over, where you were in immediate contact with him? A. About two years. 229

Q. Did you learn from your investigation anything about his physical condition? Answer yes or no. A. Yes.

Q. Did you know where he was working at that time? A. He was working at the railroad at the time.

Q. Did you also learn through your investigation whether he was working steady or not? A. Yes. 230

Mr. FitzGerald: I would like to have him tell the source of the information before he answers the question.

Mr. Sylvester: He can answer yes or no.

Q. Did you find he was or was not, Mr. Paquette?

Mr. FitzGerald: I object to that testimony as being entirely hearsay.

Mr. Sylvester: Not necessarily. It is information that was revealed to him during the investigation and things he observed, knew. He might have seen the records,—known of the man being at home different times. 231

Mr. FitzGerald: If there's records to that effect, he should produce them. This is purely hearsay.

The Court: No, I don't think so. Ask him the question "Was he working steady or spasmodically?"

232 Q. Was he working steady, Mr. Paquette? A. To my knowledge he was not.

Q. Is that one of the reasons why you furnished help to his family? A. It was.

Q. Do you now know of your own knowledge what he was suffering with at that time? A. I do at the present time but I didn't at that time.

Q. What was it? A. He was suffering from seizures or epileptic fits.

Q. Did you ever see him have one of these fits? A. I did in 1931.

233 Q. Tell the jury where it was and all about it and describe the position he was in and how it affected him. A. I was in my place of business and was talking with another gentleman and Mr. Landra was sitting on beside of us, although he was not in the conversation or anything. I had my back partly turned towards him, and while we were talking, I heard a kind of a squeal out of him and I kind of turned around and looked at him and he was just stretching out, going into one of those fits. I kind of got away from him
234 because it was the first time I really see one so close to me, but his brother-in-law happened to be there and he pulled him down and put him on the floor and loosened his collar and put some water on his head. In probably fifteen minutes or so he came to and he took him home.

Q. Now describe his breathing and how he looked when on the floor. A. Why he breathed very heavy; he frothed at the mouth a little and he really looked like a dead person.

Q. That is the only one of these seizures you have ever seen him in? A. Yes.

Q. Do you hire any help in your business? A. I do. 235

Q. Have you ever had any experience in hiring help? A. I have.

Q. Now do you know any work that this man could do, being subject to these seizures,—that is, do safely? A. No.

CROSS EXAMINATION by Mr. FitzGerald:

Q. You said as a result of this investigation of yours you had Mr. Lambra go to the Veterans Bureau? A. Yes, sir. 236

Q. Did you know he had had contact with the Veterans Bureau in 1920? A. I did not.

Q. Well if he did, do you think you were the cause of his going to the Veterans Bureau? A. I do.

Q. Even though he had been there in 1920? A. I didn't know he had been there. I was led to believe he had never had anything to do with the Veterans Bureau.

Q. That is what he told you at that time? A. I couldn't say that but something seemed to tell 237 me I was led to believe he had not.

Q. Something that was said at that time led you to believe he had had no contact with the Veterans Bureau prior to that time? A. Yes.

Q. If that was in error, it is possible other things revealed by your investigation might be in error? A. I wouldn't say that.

Q. Even though that was in error, you still say that was right? A. I don't get your meaning.

238 Q. If you knew he filed a claim for compensation in '20 and had had contact with the Bureau and had been examined by Veteran's Bureau doctors from time to time from 1920 to 1924, your report was wrong when you thought he never had any contact with them? A. No; that isn't anything out of the ordinary because there were a lot of ex-service men had been examined and let their case drop and then not take it up for four or five years.

Q. You said he had had no contact with the
239 Bureau? A. Yes.

Q. If he did have that contact, you were misled when you believed he had no contact? A. I never asked that question.

Q. What led you to believe he had had no contact? A. I couldn't say.

Q. It was just a guess? A. Probably.

Q. Then is the rest of your investigation also a guess? A. No, because I interviewed the family and I don't really think they lied to me; the
240 circumstances led me to believe they needed the things.

Q. I want to know where you got the information and what led you to believe he had no contact with the Bureau? A. Because he wasn't being taken care of; and that is why I thought he had no contact.

Q. How do you know? A. Because in the circumstances he was not drawing any compensation.

Q. Is compensation necessary for medical treatment? A. No, sir.

Q. Then you don't know whether he was having medical attention or not? A. No, sir. 241

Q. When you stated he was not having any contact with the Bureau, you may have been in error? A. I might have but I don't think so though.

Q. You said that he was not working steadily to the best of your knowledge? A. Yes, sir.

Q. When did you first know Mr. Lumbra? A. Sometime in 1924.

Q. And you knew him up through what years? A. '24, '25, up to the present time. 242

Q. You know he was not working steady through '24, '5 and '6,—along in there? A. Yes, sir.

Q. You are sure of that. This seizure you spoke of him having in 1931, do you remember that very clearly? A. Yes.

Q. How about his breathing at that time? How did he breathe? You testified he had labored breathing,—heavy breathing,—is that correct? A. It looked to me.

Q. Then the testimony you gave in the last trial must have been incorrect. Question by the Court: "How about his breathing?" Answer—"He didn't look as if he was breathing much." That isn't heavy breathing, is it? A. I wouldn't say that. 243

Mr. FitzGerald: That is all.

RE-DIRECT EXAMINATION by Mr. Sylvester:

Q. You made a rather thorough examination in this case at that time? A. I did to the best of my knowledge.

N. W. Lumbra, re-called for Pltf., Cross.

244 Q. And as a result of that, you got him in contact with the Veterans Bureau? A. Yes.

Q. And he was sent to the hospital? A. I did.

Mr. Sylvester: That is all.

NEWTON W. LUMBRA, re-called.

Cross Examination by Mr. FitzGerald:

245 Q. Mr. Lumbra, did this accident or injury you received in France,—tell us more about that,—tell us the circumstances surrounding it. A. When I got hurt do you mean?

Q. Yes. Speak louder. A. That morning,—we were out all night in the trenches, and we came in at daybreak and had just gotten in the dugout, when this bombardment started and we had to return to the trenches, and as we were out there,—I think it was around half past eight when
246 I come back in, and when I got to the end of the trench which I had to come up out of and come over the top of the ground, the short trench that led to the dugout,—that is where the explosion occurred, and it threw me—from what the boys told me, they picked me up in this short trench that led down into the dug out. They picked me up there and carried me in.

Q. Go ahead. A. And when I came to I was in the dugout and that ankle (indicating) was fractured or sprained.

N. W. Lumbra, re-called for Pltf., Cross.

Q. You say that ankle was fractured? A. 247
Either fractured or sprained.

Q. Which was it? A. I guess it was a severe sprain they had it on the record.

Q. You testified yesterday it was broken, which is correct? A. I think it was on the record of the hospital it was a severe sprain. When I come to I was very shaky, and sweat—big beads of sweat coming off me, and I remained there—and got First Aid—until that night, and then they took me to the hospital along with the rest of the casualties. 248

Q. This was in the seventy-five foot dugout the boys testified to yesterday? A. Yes.

Q. What treatment did you get as first aid? A. Well, they bandaged up my ankle and that is about all they could do for me at that time I guess.

Q. How long were you unconscious? A. I don't know. A man who is unconscious don't know how long he is unconscious.

Q. Was it all day? You know whether or not you regained consciousness, don't you? A. 249
I don't know the day, no.

Q. A comparatively short time, is that it? A. I don't know; I couldn't say.

Q. You know it was about eight-thirty when you went in there? A. I don't know when I come to.

Q. Was Mr. Bell there when you come to? A. He wasn't there when I came to. He came later.

Q. About what size was this crater testified about? A. After I looked at it, along towards

250 night, as near as I could figure that was the one, of course, I couldn't be sure because there was a lot of them, but the one that I figured, was I should say twenty foot across and probably twelve foot deep.

Q. How far was that from the dugout? A. It was probably fifty or sixty feet.

Q. Was it beyond the trench that you came through? A. Yes, just beyond; just below that.

Q. Just beyond the trench you came through. About how deep did you say that was? A. I
251 should say down twelve foot.

Q. About twenty foot across and twelve feet deep? A. Yes.

Q. How long were you in the hospital at that time? A. Well I went in—it was on June 17 I think this happened;—I am not sure, either the 16th or 17th.

Q. The middle of June somewhere? A. Yes, and I came out—they were relieved from Chateau Thierry when I came out; I couldn't remember the date but it was sometime the latter part of
252 July or August.

Q. You rejoined the outfit after they came out of Chateau Thierry? A. Yes, I did.

Q. They were back at the Rest Camp getting replacements when you rejoined them? A. Yes.

Q. When were you next in action? A. St. Mihiel.

Q. Do you recall how you went to the St. Mihiel front from the Chateau Thierry sector? A. How we went?

Q. Yes. A. We went part way by train and 253
we hiked some of the way.

Q. And whether that hiking was way back where you marched in the day time? A. No, at night I think we went, at St. Mihiel; not all night but during the night we hiked.

Q. All your hiking was at night? A. Mostly.

Q. Wasn't one day's march in the day time? A. At St. Mihiel?

Q. No, going to St. Mihiel from Chateau Thierry? A. No, I think not.

Q. When did you first suffer from these weak 254
spells you testified to? A. While I was in the hospital.

Q. What hospital was that? A. It was some base hospital; I couldn't say which one it was.

Q. It was some distance back, wasn't it? A. Yes.

Q. And did you make any report at that time to any of the doctors there? A. No, I did not.

Q. How did those spells affect you? A. I used to get dizzy and black—come black in front of me—weak. 255

Q. Did you stagger? A. Well, I would sit down when I felt these spells come on to me.

Q. Well, if you were walking along, would you stagger? A. Well, I might some, yes.

Q. Did you ever complain after you returned to the outfit, did you ever complain to any of your superiors about these spells? A. No, I did not.

Q. Did you complain to any of your comrades—associates in the service, about it? A. No, I didn't say anything to anybody about it only

256 the Captain was talking to me one day and wanted to know how I felt, and I told him.

Q. How long was that after you got back? A. Right after I got back to the outfit.

Q. Was that two weeks, a day or a month or how long? A. Only two or three days after.

Q. Who was that Captain? A. I think his name was Thompson; I am not quite sure, Thompson or Thomas.

Q. Is he the officer under whom you served until you returned home? A. No, not all the
257 time I don't think. Jack Wood was in command when we returned home.

Q. When did he take command? A. Just before we left France.

Q. Was he with your outfit before? A. No, he got transferred to our company just before we left France and was made Captain.

Q. During these marches that you had, and you did march with the outfit after you returned? A. Some of the time and some of the time I rode.

258 Q. That is, I meant you moved with the troops? A. Yes.

Q. During those marches that you made over there, did you have any of these weak spells? A. Yes, I did.

Q. And nobody noticed them? A. I just struggled along the best I could and stayed with them.

Q. And they never noticed you had these dizzy spells? A. I don't know whether they noticed it or not; I didn't tell them.

N. W. Lumbra, re called for Plff., Cross.

Q. You say you are sure none of this hike 259
toward the St. Mihiel was in the day time? A. I don't, not to my recollection now.

Q. Well, if you said it was in the day time last trial which is correct?

Mr. McNamara: That isn't a fair question, because we know what was testified to before was not.

The Court: Suppose it isn't fair?

Q. On page 72 of the transcript "During that hike you marched some long hike, didn't you?" Answer "Yes". Which would be cor- 260
rect? A. I think in the other trial when you asked me that you were referring to something else.

Q. Which would be correct? A. To my recollection we didn't hike in the day time going to St. Mihiel.

Q. You never made any complaint to any of the doctors? A. No, sir.

Q. Or to the fellow soldiers at all? A. No, sir.

Q. Now before the war you were working in 261
the woods, were you? A. Yes, sir.

Q. For what company? A. The Nelson Hall.

Q. How many camps did they have up there? A. Why—

Q. Several or just one? A. Oh, they had more than one.

Q. Which camp were you working in? A. The camps were numbered; I don't recall now the number of the camp.

Q. Who was your foreman? A. Well, the

262 head foreman I think was Charles Donnelly. He wasn't in the woods all the time.

Q. Who was his assistant in immediate charge of you, if you know? A. Well, they was a number of different foremen up there.

Q. In your camp there wasn't. A. I think Joe LaFrank was the one up there when I worked there.

Q. You worked for Mr. LaFrank? A. Yes.

Q. For how long a period did you work there? A. The year they built that log hauling
263 road—that took a good part of the summer, and was in camp all winter.

Q. What year was that in? A. Well, it was in '14 or '15, I cannot recollect just which.

Q. '14 or '15? A. Sometime along there; before I went in the service quite a while.

Q. They built a log haulers' road? A. Log haulers they used up there to draw the logs.

Q. That was along about '14 or '15? A. I should think it was.

Q. You went in there what month? A. They
264 started this road in the summer time.

Q. When did you go in? A. I went in when they started to build the road.

Q. You started to work in there about what month then? A. Well, I couldn't say what date it was or exactly what month.

Q. June, July, March or April or where was it? A. I think along June or July somewhere.

Q. You worked there steadily until when? A. Until we got in the woods. The road was built, and built the camp and stayed there all winter.

N. W. Lumbra, re-called for Pltf., Cross.

Q. What did you do in the winter? A. Cut logs. 265

Q. Again working for Joe LaFrank? A. He wasn't boss when they built the road. I was trying to think of his name.

Q. You worked for that full winter for Mr. LaFrank? A. Yes.

Q. You stayed in there all winter? A. Yes.

Q. When did they start cutting? A. Along the latter part of September or October.

Q. They finished up when? A. Well, they finished up I should say January or February. 266

Q. And then you came back when you finished cutting? A. We came out I think the latter part of March.

Q. What did you do from March? A. They drew logs all the time and they had to have men up there. I used to help them load; I didn't draw logs.

Q. Were you on the payroll at that time? A. Yes.

Q. You worked every day? A. Yes.

Q. And you worked from July until March? 267
A. Yes, sir.

Q. Where else did you work before the war? That takes care of nine months about? A. I worked in the mill for Nelson Hall before the war.

Q. What years did you work in the mill? A. I think it was in '16.

Q. Well, what did you do from 1915 to 1916? A. I think I worked for Mitchell Brissette in the woods cutting logs.

N. W. Lambra, re-called for Plff., Cross.

268 Q. Was that also a Nelson Hall development? A. He had a job for Hall I think at that time.

Q. What year was that, what period was that? Fall or Spring? A. It was during the winter.

Q. That would be from the fall of '15 to the spring of '16, is that it? A. Yes.

Q. Then what did you do from the spring of '16? A. That is when I went in the mill to work.

Q. You went in the mill in the spring of '16? A. Yes.

269 Q. And you stayed there until you went in the army? A. No, I was there six or eight months I think and then I went to work for my brother. I was working for my brother on the farm when I went in service, for Bert Lambra; he lived at South Richford then.

Q. What did you do in the year '13 and '14 if you know? A. Well, it is pretty hard for a man to go back and tell. I did a number of different jobs.

Q. Part time here and part time somewhere
270 else? A. Yes.

Q. When you came home you again went to work for whom? A. Nelson Hall.

Q. At the veneer mill? A. Yes.

Q. And you worked for him how long, or them? A. Well, I was there—I went to work about three or four months after I came back and worked the rest of '19,—that is, when I was able to work, and '20, and then I worked some in '21; not very much.

Q. '19, '20 and '21 you worked in with Nelson Hall? A. Yes, sir.

N. W. Lumbra, re-called for Plff., Cross.

Q. Then you left Montgomery Center in '21? 271
A. Yes.

Q. And then where did you go? A. Richford.

Q. For whom did you work there? A. For the same company there a while that winter.

Q. How long did you work there? A. I don't think I worked over a couple months that winter, and then I went up to my sisters and stayed a while.

Q. Then where did you go? A. I came to St. Albans. 272

Q. And have been there since? A. Yes, sir.

Q. And you went to work for the C. V.? A. Yes.

Q. When did you start there? A. I think it was in July, 1922.

Q. You left Montgomery Center in when? A. 1921.

Q. What month? A. It was along the latter part of the year.

Q. September or October, in there? A. Pretty near 1922 when I went to Richford. 273

Q. And you had been working in Montgomery Center up until the time you left there? A. Yes.

Q. Then you went to Richford? A. Yes.

Q. And worked there that winter? A. Some, yes.

Q. And then came down to St. Albans? A. Yes.

Q. And you started working for the C. V. in July? A. Yes.

N. W. Lumbra, re called for Plff., Cross.

274 Q. And you remained in their employ until when? A. 1929.

Q. When did you go to Mechaniesville? A. I think it was in '23 or '4; '23 I guess.

Q. Somewhere '23 or '4, in there? A. Yes.

Q. You resigned from the C. V. at that time, didn't you? A. Yes.

Q. And how long did you work for the B. & M. at Mechaniesville? A. I think I was there about six months.

Q. Then you came back to the C. V. again? A.
275 Yes.

Q. Where was your work more regular, for Nelson Hall Co. or the C. V.? A. Why, I should judge it was about the same.

Q. Haven't you stated your condition has grown gradually worse? A. Well, it has.

Q. Then wouldn't you lose more time? A. I think I did lose more time there.

Q. You lost more for the C. V. than you did for Nelson Hall? A. Yes.

Q. Now you returned to your outfit to go
276 back over seas again,—you returned to your outfit in July or August; can't you come a little closer to that? A. When they come out of Chateau Thierry; I cannot remember the date.

Q. Do you recall the date when you were in this conversation with Captain Thompson? A. I think it was around the first part of August.

Q. Before you went into the service, were you employed somewhere rolling logs? A. Nelson Hall Co.

Q. And how many hours a day did you work

there? A. I don't know whether they were work- 277
ing nine or ten hours,—I don't recollect just now.

Q. How much were you paid? A. Well, my pay wasn't very big before I went in the service; I don't think it was over ten dollars, ten or eleven dollars a week.

Q. What were you paid at the veneer mill when you came back? A. When I came back?

Q. Yes. A. I think it was around three dollars a day, or something like that.

Q. How much would that be a week? A. Well, six days a week would be eighteen dollars. 278

Q. When did these dizzy spells that you have complained of, develop into these seizures, Mr. Lumbra? A. Either the latter part of 1922 or the first part of '23, somewhere in there.

Q. When did you have your first seizure? A. I think it was—the first part of 1923 is my recollection.

Mr. Sylvester: I want to know what he means by "seizure"?

The Court: He means what the word implies. 279

Mr. Sylvester: Whether he became unconscious?

The Court: You ask about that later. You shouldn't interrupt this examination for that kind of thing.

Q. How did you feel after these attacks? A. I didn't feel very good. I felt sore,—lame.

Q. This soreness and lameness,—where did that affect you? A. All over.

Q. Was it muscular or in your joints or where? A. It seemed to be in the muscles.

N. W. Lumbra, re-called for Plff., Cross.

280 Q. All your muscles were affected? A. It seemed to be from a strain you know.

Q. How long would that last? A. Sometimes it lasted longer than others; it depended on how many seizures I had.

Q. Take an average. A. Sometimes three or four days; sometimes longer.

Q. Now when you first filed claim for compensation,—you did file a claim, didn't you? A. Yes.

Q. Do you recall what your complaint was then? A. No, I don't.

281 Q. Well, whatever was troubling you, you told, didn't you? A. Well, I had lots of different things troubling me at that time. I had bronchial trouble, and some rheumatism,—arthritis or whatever they call it.

Q. You were claiming compensation in order to connect your difficulty with service, weren't you? A. Well, I didn't know much about it then, only just what somebody told me, and I filed a claim,—that's all.

Q. You knew it had to be service connected?

282 A. I didn't know a thing about it; I didn't know any more about compensation than I did about the moon.

Q. When you filed that claim stating certain disabilities, didn't you? A. I must have.

Q. Those disabilities were the ones that were most annoying at that time, is that right? A. Well, these dizzy spells, I was having, I didn't pay much attention to them because I thought it was just something that was going to work away; something that was temporary and would gradually go away after a while.

Q. You still thought they were going to wear away. When did you file this claim? A. I think in '20. 283

Q. You had been having these dizzy spells from what period of time? A. From the time I was in the hospital.

Q. That was in the summer of 1918? A. Yes.

Q. You had these spells for two years and thought they were going to wear away? A. Yes, I didn't know; I am not a doctor.

Q. That is what you just said, is that correct? A. Yes. 284

Q. And you made no mention of them at all? A. Well, I went to Dr. Hunt.

Q. You told Dr. Hunt about these dizzy spells? A. I went to him to have him take my blood pressure the first time because I thought it was high blood pressure that caused it.

Q. Didn't you testify yesterday you didn't have a doctor until 1926? A. No, I didn't. I went to Dr. Hunt in 1919, I testified yesterday.

Q. You had been working for the Central Vermont how long before these attacks caused you to lose time? A. Well, I had lost a lot of time from the time I began there right up through. 285

Q. You began losing time as soon as you started there? A. Yes, soon after.

Q. Well, if your testimony in the first trial—

The Court: Well, we won't go into what his testimony was.

Q. What was your testimony in the first trial as to when you first had a doctor? A. My recollection is better now than it was in the first trial.

N. W. Lumbra, re-called for Pltf., Cross.

286 Q. What do you say now? A. When I first had a doctor?

Q. Yes? A. 1919.

Q. Then you said in the first trial, page 73—"When did you first have a doctor attend you?" "Well, about 1926." Then that was wrong? A. Yes, it was.

Q. What did Dr. Hunt treat you for? A. Nerve trouble and bronchitis.

Q. When was the first time you had treatment for these dizzy spells or seizures that you now
287 have? A. Well, that was 1926.

Q. When you reported for treatment in 1926 did you tell the doctor how long you had been having those attacks? A. No, I don't think I said anything about it.

Q. Why did you go to him? Didn't you go to him for relief? A. Well, they sent me to him.

Q. Who? A. The Veterans Bureau.

Q. In '26? A. Yes.

Q. To whom? A. Dr. Herman.

Q. Had you made a report to the Veterans
288 Bureau as to what your condition was? A. They had examined me,—I suppose they knew.

Q. You didn't tell them? A. Certainly I told them.

Q. Then when you went to Dr. Herman you told him what your condition was? A. I gave him my letter of authority they sent me, and he took it and read it, and done what I suppose he wanted to.

Q. Who examined you for purposes of compensation in '20? A. Dr. Herman.

N. W. Lumbra, re-called for Plff., Cross.

Q. Did you tell him at that time what your trouble was? A. I got started to tell him but he wouldn't let me finish. 289

Q. He wouldn't let you finish? A. No.

Q. When you went to him in '26 did you start to tell him then? A. Dr. Herman—I am going tell you,—is a very peculiar man. When you start to try to tell him something you ain't going to get very fur with it if he knows it. He cuts you off.

Q. You didn't tell him for that reason? A. I tried to tell him lots of things, lots of times, but I never made out. 290

Q. Were you ever treated by doctors other than Dr. Hunt and Dr. Herman? I mean treated,—I don't mean Veterans Bureau examinations. A. Only in the Veterans Bureau hospitals.

Q. That is the only treatment you had, outside of the Government full time doctors; was that by Dr. Hunt and Dr. Herman, is that correct? A. Yes.

Q. When did you first file claim for compensation? A. 1920. 291

Q. Did you file any other claims? A. Well, I might have; I don't recollect now.

Mr. FitzGerald: I would like to recall the plaintiff later to identify certain papers that I don't seem to have here,—in order to let the trial go along?

The Court: Yes, you may do so.

292 RE-DIRECT EXAMINATION by Mr. Mc Namara:

Q. You have told about different employments that you held at various periods prior to the war, starting around '13 and '14, up until you went in the army. Do you know if you have told us all the jobs that you had? A. Well, it is pretty hard to go back all those years and remember just what jobs you had.

Q. In answer to Mr. FitzGerald's question, did you tell him anything about working for Mr.
293 Foley who testified here yesterday? A. No, I don't think I did.

Q. Did you work for him at some time? A. Yes, I worked for him one year drawing logs before Arthur Hutchins' mill burned down, and I worked for him two seasons in haying.

Q. Did you perhaps have other employments, in the same way you now forgot and may not have told us about? A. Yes.

Q. How were you, did you work steadily or otherwise, from '13 up to '17? A. Yes, sir.

294 Q. Worked practically all the time? A. Yes, sir.

Q. When you went to Dr. Hunt did you explain to him just what was bothering you? A. Yes, I wanted him to take my blood pressure, I thought it was blood pressure.

Q. You told him how your head felt and about these seizures at that time? A. Yes.

Q. And Dr. Hunt did treat you for nervousness? A. Yes.

Q. Was there some reason why you didn't call

a doctor in the period 1922 to '6 when the Govern- 295
ment first authorized you to go to their doctor? Was there some reason you didn't? A. Well, I tell you, the more I said about it to the doctor or anybody else, I thought wasn't going to get me anywhere; I figured I was going to lose my job anyway, and I thought if I said something I would lose it quicker.

Q. Was your financial condition such — A. I couldn't afford a doctor.

Q. This was when you had to have help from the Legion? A. Yes.

Q. You were on the payroll of the C. V.? A. 296
Yes.

Q. But during this time you had to get this help from the American Legion? A. Yes, sir.

RE-CROSS EXAMINATION by Mr. Fitz-Gerald:

Q. As to your residence when you came home, Mr. Lumbra, where did you go to live? A. With my mother.

Q. Where was that? A. Montgomery Cen- 297
ter.

Q. How long did you live with your mother? A. I lived with her until she died.

Q. How long was that? A. She died in '20, September.

Q. September, 1920? A. Yes.

Q. When were you married? A. I was married in the spring of 1920.

Q. And you and your wife made your home with your mother? A. Yes.

N. W. Lumbra, re-called for Pltf., Re-cross.

298 Q. And after your mother died, where did you live? A. We went to live with her people.

Q. With her people? A. Yes.

Q. Mr. Lumbra, have you ever been arrested? A. Yes.

Q. For what? A. Intoxication.

Mr. McNamara: I object to that.

The Court: Suppose he has been arrested? That isn't admissible.

Mr. FitzGerald: The second question would make it admissible.

299 The Court: Come to the second question and leave out the first one which is inadmissible.

Mr. McNamara: The second one is also inadmissible. We ask that be stricken.

The Court: I won't strike it.

Q. Have you ever been arrested for drinking? A. Yes.

Mr. McNamara: I object to that.

The Court: How is that any better?

Mr. McNamara: It is worse.

300 Mr. FitzGerald: It is quite admissible in this case.

The Court: If a man has been arrested, is never admissible. If he has been convicted of some crime, it is sometimes admissible, but a great many people who have been arrested, have been acquitted.

Mr. FitzGerald: Yes, your Honor. May I withdraw the question?

The Court: Certainly.

Q. Withdrawn.

N. W. Lumbra, re-called for Pltf., Re-cross.

The Court: Certainly you can; if you don't withdraw it, I will withdraw it for you. 301

Q. Have you ever plead guilty to the charge of drunkenness? A. Yes.

Q. Have you ever plead guilty to the charge of non-support?

The Court: How is that admissible?

Mr. McNamara: We object to that.

The Court: You are pretty late.

Mr. FitzGerald: I offer to show he was arrested for non-support by his wife, who knew his condition. If he was not able to work, she wouldn't have prosecuted him. 302

The Court: That is not admissible. How is it important whether he plead guilty to being intoxicated?

Mr. FitzGerald: It is important for this reason your Honor: In this case we hope to show that his present condition might be brought about by excessive use of alcohol.

The Court: Why wouldn't it be better to show that alcohol is the cause of his condition to begin with? 303

Mr. FitzGerald: You cannot show that from lay witnesses.

The Court: You can put on professional witnesses.

Mr. FitzGerald: We hope to your Honor.

The Court: You said that in the other trial and you didn't.

304 Mr. FitzGerald: Two doctors testified to it.

The Court: They said it might. If the fact was so, they could say so.

Mr. FitzGerald: The only way they could do it would be from a long period of observation.

The Court: Let's treat this soldier boy absolutely fair here.

Mr. FitzGerald: We are trying to your Honor.

305 The Court: I doubt it very much.

Mr. FitzGerald: I am sorry, I am.

The Court: To say he's been found guilty of non-support, how is that admissible in this case? Supposing she thought he was capable, is that any reason that the jury should think he was capable? I may think this capable or incapable but that doesn't make evidence for or against him. It is what the facts are.

Mr. FitzGerald: It is something they
306 can have to consider.

The Court: No, it isn't evidence the fact is so. The wife may have got mad at him and wanted to put him in jail anyway, for anything she could get him in for. The question for us here is—we are going to try this case instead of resorting to outside things that have nothing to do with it,—what was this soldier boy's physical condition? Not what some wife has done to him. I cannot see how it is important

at all if he's been unfortunate enough to have been convicted of being intoxicated, unless alcohol is the cause of his present condition. 307

Mr. FitzGerald: There isn't any doctor can come in and say anything is the specific cause of his condition.

The Court: Isn't the real purpose of putting that in to inflame the human mind against this soldier boy?

Mr. FitzGerald: No, it isn't.

The Court: It looks to me as if it were. 308

Mr. FitzGerald: No, it is to affect his credibility.

The Court: You have your own way but I resent it.

Mr. FitzGerald: I apologize to the Court.

The Court: That doesn't help the soldier boy. He cannot live on an apology.

Mr. FitzGerald: If the suggestion has been prejudicial, it is within the right of the attorney for the plaintiff to move for a new trial and it will not be opposed at all. 309

The Court: This is the second trial. This is a new list of jurors. This boy wants the rights of his case.

Mr. FitzGerald: There can be another jury empaneled and it will not be opposed by the Government.

N. W. Lumbra, re-called for Pltf., Re-direct.

310 RE-DIRECT EXAMINATION by Mr. McNamara:

Q. Did that intoxication come about by reason of you and someone else ringing the church bell on a third of July night? A. The one before that, he is referring to,—on March meeting.

Q. Have you been given to the use of intoxicating liquor since you got out of the army? A. Have I what?

Q. Have you used intoxicating liquor to any extent? A. I would take a drink; not to any
311 extent.

Q. Ever drink to get drunk? A. Well, I have, Yes.

Q. Since the war? A. Not very often.

Q. During the time you were with the C. V. Railroad, you didn't drink, did you? A. No, sir.

Q. Since 1922 down to date you haven't had any intoxicating liquor? A. No, sir.

The Court: You didn't make it clear whether the ringing of the bell for Town
312 Meeting was before or after the war, did you?

Mr. McNamara: No, I didn't.

The Court: I would like to know whether it was before or after the war? No, I guess I won't. You take your own course.

Q. Was that before or after the war that that happened? A. After the war.

Q. The summer after you got back? A. Yes.

M. Brissette, for Plf., Direct.

MITCHELL BRISSETTE called as a witness by the plaintiff, being duly sworn, testified as follows: 313

Direct Examination by Mr. McNamara:

Q. Your name is Mitchell Brissette? A. Yes, Mitchell Brissette.

Q. You now live in St. Albans? A. Yes, sir.

Q. Lived there for how long? A. Since 1922.

Q. What is your business? A. I am car man for the Central Vermont Railroad. 314

Q. Prior to the war did you live in Montgomery? A. I lived there before the war,—at the time of the war. I lived there from the time I was born until I left in '22.

Q. Did you know Newton Lumbra there in Montgomery? A. Yes, sir, as long as I can remember.

Q. Did you work with him sometime before the war? A. Yes, sir, he worked for me in 1915 in the woods cutting logs.

Q. For how long a period was that? A. I 315 wouldn't dare say exactly because we didn't keep very good records; we didn't have any records or secretaries or one thing and another, but he worked, if I recollect right, practically that winter of '15.

Q. Just what was his work there? A. His work was handling an axe and a crosscut saw, cutting logs.

Q. How many hours a day did he put in? A. I would say anywheres from eight and a half,

316 nine to ten hours a day, depending on what luck we had cutting the logs. He was very steady for the reason we had a certain amount of men and if you break the team up you are out of luck.

Q. Do you know of him losing any time during that winter period? A. Not to my knowledge.

Q. What kind of a workman was he? A. He was a very good workman, very tough and rugged; he was as strong as a bear at that time.

Q. This was in the winter of '16? A. '15.

Q. Did you know him from then on until he
317 went in the army? A. Yes, and then he worked to the veneer mill. I worked a while there with him I believe in '16.

Q. Do you know what he was doing there? A. He was working on the vat, rolling blocks or logs into this vat.

Q. Is that heavy or light work? A. That is heavy work, I would consider it.

Q. Do you know how steady he was there? A. I wouldn't dare say to that fact.

Q. Did you know of his having any physical
318 disability at that time? A. No, I did not.

Q. Did you have anything more to do with him after that time until he went in the army? A. Not to my recollection.

Q. You saw him around? A. I saw him around, of course, working around.

Q. Any change in his appearance from the time he was in the woods that winter with you until he went in the army? A. No, he didn't act so to me anyway. He seemed to be lively.

Q. You were there when he came back from the war? A. Yes, sir.

Q. Did you see him around the time he came back? A. I wouldn't dare say just how soon but soon after he came back because I was living right there in Montgomery Center. 319

Q. Did you notice any change in him? A. Yes, I did.

Q. What was it? A. He acted slower of movement; in a way he acted like a man who had some shock or something; some serious operation. He moved around very slow and it was peculiar to me because he had always been very active up until the time he joined the army. 320

Q. Was this quite noticeable to you, so by looking at him you could see that change? A. You could see when he moved around, because he was very active before, and to see him that time he didn't act as though he was coming or going; just moping around.

Q. Did you know about his work there in Montgomery after the war? A. Of that I haven't a very good recollection. You see I didn't have any particular notion of following up his work or anything, and I think I would be safe in saying I wouldn't have anything to say on that until about '22. 321

Q. In 1922 you did become closely acquainted with him again? A. Yes, sir, I hired out in '22 to the Central Vermont Railroad.

Q. Did he hire at the same time? A. I think it was in July.

Q. What part were you in? A. I was in the car department; passenger and freight department.

M. Brissette, for Plff., Direct.

322 Q. And where was he? A. He was in the motive-power.

Q. Did you see him frequently? A. I see him at noon time or night, or something like that, or in the morning.

Q. Did you know how he was for steadiness there? A. Well, I would notice him out perhaps on the street at times and I might ask him how he felt or something? I really felt if he was loafing he had to have some excuse for not working. I wouldn't specify just exactly how

323 Q. Did you work with him in the same department for the C. V.? A. I believe it was around '24 or '5, if I recollect, he worked into the car department.

Q. With you? A. As a laborer; not with me; he was all around the department there.

Q. How did he do his work there? A. Well, he tried to do the best he could I suppose, and as the boys would see he couldn't do his work, if there was any little lift they could give him, they would. They had him on as a laborer, finally he
324 couldn't do the work was set out for him and they made him I would call him janitor, cleaning offices and lavatories and so on and so forth.

Q. Could he do the work the other men in the department were required to do? A. No, sir.

Q. You say he was helped by the other men? A. Yes, sir.

Q. Did he lose any time? A. Yes, sir.

Q. How much? That is, in your judgment?

Mr. FitzGerald: I object; the records will show.

The Court: He can tell if he knows, much or little. 325

A. To that question I wouldn't dare say. I know he lost quite considerable time but I wouldn't dare say. I know he would have these spells and when he come back to work he acted to me like a man who come out of a long illness and was trying to get back to work; that is the way it seemed to me.

Q. Each time he would be off for a day or two and come back, would he have that same appearance again? A. Yes, he would. 326

Q. Of course, you knew he was an ex-service man? A. Yes, sir.

Q. Do you know if the other men in the department knew that? A. I wouldn't dare answer that question. Without a doubt they did.

The Court: Why wouldn't you dare answer it?

Witness: I personally wouldn't know. I figured they did know but I wouldn't say for sure. I wouldn't want to commit myself to that effect. 327

Q. You did know he was receiving some special consideration? A. Yes, sir, to my knowledge if you work for the Central Vermont Railroad, not that it is a hard railroad to work for, but when you are losing all this time, someone has got to know the reason that you are loafing,—I do know that,—and I considered they must know he was an ex-service man or something why he was losing this time, in order to hold his job.

Q. And that they were excusing him for some such reason? A. Yes, sir.

328 CROSS EXAMINATION by Mr. FitzGerald:

Q. You don't know anything about Mr. Lumbra from the time he was discharged until '22, is that correct? A. Not much; I saw him in 1919.

Q. You don't know whether he was working,—you are not able to testify on that point, from '19 to '22? A. I practically cut that out.

Q. You say you saw him in '22 when he went to work for the Central Vermont and then you resumed your friendship? A. Yes, sir.

Q. And you saw him on the street at times?

329 A. At different times.

Q. During the day or night? A. I would see him if he was working, through the day.

Q. These times on the street? A. I wouldn't specify; it might be through the day or at night; he might be getting over these spells and be walking around the street.

Q. Then if it was during the day, you wouldn't be working either? A. That would be after four o'clock.

Q. You testified he lost time, Mr.—what years,

330 did he lose the most time, do you know? A. Well, I know in our department, if I recollect right, he worked there from around '24 —'26, or something to that effect.

Q. From 1924 to 1926, and how much time would you say he lost there? A. I wouldn't dare say that. He lost considerable. I would say on an average perhaps he didn't work over—well, I will set it around three or four days a week.

Q. He lost about half time? A. I should figure that.

MRS. FLORENCE LUMBRA, called as a wit- 331
ness by the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Sylvester:

Q. You are the wife of Newton Lumbra? A. Yes, sir.

Q. When were you married? A. I was married in 1922, December first.

Q. And have you lived with your husband since then? A. Yes, sir. 332

Q. Where do you live? A. In St. Albans.

Q. How many children have you? A. I have two, a girl and a boy.

Q. Did you know anything about your husband's physical condition at the time you married him? A. Just what he told me.

Q. How long had you been married to your husband before you discovered something about his physical condition? A. About four months.

Q. And that would be the early part of 1923? A. '23. 333

Q. What happened the early part of 1923? A. He had a fit.

Q. What time of day? A. Four o'clock in the morning.

Q. Tell the jury how he acted, what happened and all about it? A. I heard him groan and he fell to the floor.

Q. And where was he when you found him? A. On the floor; between the kitchen and the dining room on the floor.

334 Q. How long was he unconscious this time? A. About ten to fifteen minutes.

Q. Did he go to work that day? A. No, sir.

Q. How long after that was it before he went to work? A. Quite a few days after.

Q. Now, between the date of your marriage and 1923, the early part of 1923, what was his conduct? A. It was good.

Q. How did he act? A. He act? He used to come home from four until six and would lie down and rest until supper was ready.

335 Q. Did he appear tired out when he come home? A. Yes, he appeared tired out when he come home.

Q. Who was he working for at that time? A. The Central Vermont Railroad.

Q. From that time on, did he continue to have these "fits" as you term them? A. Yes, sir.

Q. And did they become more or less frequent? A. More; he had them more often and harder.

Q. How many would you say he was having a
336 month? A. He had two to five a month.

Q. Did he continue to have these during the years '24 and '5? A. Yes.

Q. And he was still working at the Central Vermont? A. Yes, sir.

Q. How much time would you say he was losing? A. Quite a little time.

Q. Did you know of his having these spells anywhere other than to home? A. No, sir, I did not.

Q. Did there come a time when you were

obliged to ask for help from someone? A. Yes, 337
sir.

Q. Whom did you ask? A. The American Legion.

Q. Did you receive any help from them? A. Yes, sir.

Q. When was that? A. In 1926.

Q. Was he working at this time? A. Yes, sir.

Q. What did the American Legion do for you at that time? A. They sent my husband to the hospital. 338

Q. And what did they do for you? A. They give me wood, coal, groceries and rent.

Q. Do you know what hospital he went to? A. Yes, sir, the Chelsea Naval Hospital, and Washington.

Q. Did you at any time go with him? A. Yes, sir.

Q. How many times? A. I went with him three times as his attendant.

Q. Who sent you? A. The Veterans Bureau and the Government paid my expense. 339

Q. How long did he stay at the hospital the first time he went? A. A month.

Q. And how many times has he been since then? A. He has not been since 1930.

Q. He hasn't been since 1930? A. 1930 was the last time he went, and I went with him.

Q. How long did he stay that time? A. He was gone six weeks.

Q. Who was attending your husband during this period of time, if you know? A. From 1926?

Q. Yes. A. Dr. Herman.

340 Q. Did you at any time call Dr. Hernian when he was having these seizures? A. Yes, he saw him in one; the first one was 1926.

Q. You hadn't called him any time before this? A. No, sir, couldn't afford one.

Q. Did your husband always come out of these seizures? A Yes, sir, I always stayed right with him.

Q. Has he ever been injured in one of them? A. Yes, sir.

Q. When was that? A. That was in 1929.

311 Q. What happened that time? A. He went up street and come home, and he had a fit,—I was getting dinner,—and he come home—I was frying my meat for dinner and the first thing I knew he fell behind me. He went in the woodshed to get some wood and he fell down and had black eyes. He fell down,—had a fit,—and I went out to help him.

Q. Now, did there come a time when your husband lost his job? A. Yes, sir, 1929, February 28, 1929, he got fired.

342 Q. And do you know the reason he was fired? A. Yes, sir, because he had epileptic fits.

Q. What happened that morning, if anything, before he went to work? A. From six o'clock in the morning until seven he had six fits, one right after another. Eight o'clock he went to work, and nine he was brought home.

Q. Who brought him home? A. Two men by the name of Garrett and Mitchell.

Q. After he was brought home, what did you do? A. I helped him undress and put him to bed and went to see Mr. Noell and the nurse.

Q. Did you have some talk with the nurse? A. Yes, sir. 343

Q. And as a result of that conversation which you had with the nurse, did you learn what happened? A. I learned my husband had epileptic fits.

Q. And did you see someone else that morning? A. Yes, sir, I saw Mr. Noell.

Q. What was the purpose of your going to see Mr. Noell? A. To see if he could get his job back, and he said he couldn't keep him on account of it being a liability having a man with fits. 344

Q. Did he take him back? A. No, sir.

Q. Has your husband been working anywhere since then? A. No, sir; not for three years; going on four years.

Q. Do you know of his attempting to get employment? A. Yes, sir.

Q. Where? A. To the City Manager.

Q. Anywhere else? A. All over.

Q. Has Newton had any of these seizures recently? A. Yes, sir.

Q. When was the last time? A. Friday noon; 345 last Friday noon.

Q. How many did he have? A. He had fifteen inside of ten days.

Q. And the last one was Friday? A. The last one was Friday.

CROSS EXAMINATION by Mr. FitzGerald:

Q. Did you know anything concerning Mr. Lumbra from 1919 to 1921? A. I met him in 1921.

346 Q. You didn't know anything about him before that? A. No, sir, I am his second wife.

Q. When did he have his first seizure? A. In 1923; the early part of 1923.

Q. From the time you knew him in 1921 until this time in '23, did he have any other similar attack to your knowledge? A. Not as I remember.

Mr. FitzGerald: That is all.

347

JOHN R. DODGE, called as a witness by the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Sylvester:

Q. Your name is John R. Dodge? A. Yes, sir.

Q. You reside where? A. Montgomery Center.

Q. How long have you lived there? A. Why,
348 right in the Center, thirty years,—thirty-two years.

Q. Do you know Newton Lumbra? A. I do.

Q. Do you hold some town office there now, Mr. Dodge? A. I am Overseer of the Poor, Constable and Deputy Sheriff.

Q. Now you say you do know Newton Lumbra? A. Yes, sir.

Q. How long have you known him? A. Why ever since he was big enough to walk.

Q. You knew him before he enlisted in the army? A. Yes, sir.

Q. Now what kind of a boy was he, Mr. Dodge? 349
A. He was a good, tough, rugged, active boy.

Q. Vigorous and active? A. Yes, sir.

Q. Did you know anything about his employment before he enlisted in the army? A. Well, I know when he was young, while his father lived, he had to work hard and I guess after his father died he tried to. He had to stay home with his mother on the farm at first and work I guess.

Q. Did you see him after his return from the army? A. Yes, I saw all the boys a few days after their return. 350

Q. Did you notice any material change in him after he had returned? A. I noticed along later that he didn't act as he did before; that is, he wasn't so vigorous and didn't seem to be as—I don't know whether you call it "bright"—but he wasn't as active as he was before.

Q. He appeared to be dull? A. Yes,—dull.

Q. Did he have a reputation about Montgomery of being a good, steady, conscientious boy?

The Court: That isn't admissible.

Q. Waived. 351

Q. Was it noticeable to you, Mr. Dodge, that there had been a marked change in his appearance after he returned? A. I think there was. I would see him,—of course I was truckman there at that time,—trucking through the village I would see him around his mother's, and I noticed he wasn't working much.

Q. Had you noticed him around the village before he enlisted as much as he was after he returned? A. No, before he enlisted I think he

352 worked and tended to business as well as the average.

CROSS EXAMINATION by Mr. FitzGerald:

Q. Did you know him intimately before the war, Mr. Dodge? A. Yes, sir.

Q. And after his father died, you guess he worked? A. He worked in this way—of course he stayed with his mother,—she was on a little farm there, and he tended to things and was there I guess.

353 Q. Did you know anything about his employment in the woods as a chopper? A. No, I don't know anything about his employment in the woods.

Q. Did you know anything about his work in the mill? A. I knew he worked in the mill.

Q. Before or after the war? A. Before the war.

Q. Did you know about his working after the war? A. I knew he didn't work a terrible lot. This was hearsay some, and then he hung around.

354 Q. What you know yourself. A. I know he was around home a good deal and was around the streets after the war.

Q. You don't know whether he worked in the mill after the war? A. I know he tried to, but—yes, I saw him in there working.

Q. Do you know whether or not his employment was any more regular after the war in that mill than it had been before? A. I don't think it was as regular. I don't think he worked as before, because he was hanging around the Center.

I was through the Center from one to fifteen times a day, right by his house. 355

Q. Isn't it true you had more opportunity to see him in the Center after the war because they had moved into the village where they had been outside before? A. Not really, because I was working on the road and by his house and so on and so forth. I have always been more or less acquainted with him and saw him.

Q. Isn't it true he was in the village more after the war than before for that reason? A. Sure he was in the village more after the war than before. 356

Q Because he lived there after the war? A. Sure.

DR. FRANK B. HUNT, called as a witness by the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. McNamara: 357

Q. Give us your full name Doctor? A. Frank B. Hunt.

Q. You are now a practicing physician in Fairfax? A. Yes.

Q. State your medical training? A. University of Vermont.

Q. And finished there when? A. 1913.

Q. You have practiced medicine in Vermont since then? A. Yes.

Q. Did you practice in Montgomery at some time? A. Yes, sir.

358 Q. When were you there? A. I went there in January, 1918, and stayed until 1922, May I think.

Q. Do you keep office records of your patients who call on you? A. Not treatment records.

Q. What kind of records do you keep? A. Just charges.

Q. Did you have any record in your file of Newton Lumbra? A. I haven't any, on treatment.

Q. Do you recall treating him in 1919 and
359 '20? A. I recall him coming into my office. I couldn't say what I treated him for.

Q. At the last trial you were shown a statement you made to the Government back in '20 or '21,—do you recall that? A. Yes.

Q. Did that help you then recall for what you had treated him? A. Yes.

Q. What was it you treated him for? A. I don't recall.

Mr. McNamara: Will you give that paper, please? (Mr. FitzGerald looks
360 through his files.) I can ask a question and clear this up, if they cannot find the form.

The Court: That can be found, of course, or has it vanished?

Mr. McNamara: It was admitted as an exhibit in the other trial.

(Dr. Hunt excused at this time.)

JOHN S. CARROLL, called as a witness by 361
the plaintiff being duly sworn, testified as follows:

Direct Examination by Mr. Sylvester:

Q. You reside where? A. St. Albans.

Q. How long have you lived there? A. Forty-five years.

Q. What is your business there, Mr. Carroll? A. General Foreman of the Motor Power Shop.

Q. Do you know Newton Lumbra? A. Yes. 362

Q. At some time did he work under you? A. At first he worked under me in 1922, in New London.

Q. Did he later work under you at St. Albans? A. Yes, he did in 19—(looks at paper) 1926, as a watchman.

Q. How long, in all, was he under you, Mr. Carroll? A. From 1926 until 1929.

Q. I want you to describe to the jury what he attempted to do while working under you and how he did it, and describe his general appear- 363
ance and all about it; what assistance was given him, if any? A. In 1926 he was transferred to the motor power shop as a watchman and he was off a good deal of the time on account of his health, and as this job required a man all the time, watching, we had to reduce him as a laborer, and being as a laborer he lost a lot of time. In 1929 he had a bad spell and he was sent to our railroad Doctor and his condition was such that we couldn't employ him longer.

364 Q. Now can you tell us more about how he did his work while he was under you? A. He appeared to be very logy and acted as though, at times after he loafed, as if he had been through illness had been sick, didn't seem to have any ambition.

Q. Was he favored more or less by you and his fellow employees? A. Yes, he was.

Q. Tell us about that? A. Well on account of being an ex-service man and not feeling good, he had had several leaves of absence and we ex-
365 pected his health would be restored to him which wasn't.

Q. Why was he favored over other men? A. On account of being an ex-service man.

Q. Was he able at any time to compete with the other men in that same line of work during the time he was under you? A. No.

Q. Why was he allowed to keep his job as long as he did there? A. Well he was a healthy looking boy, and as I said, he had been on several leaves of absence,—been in the hospitals,—and
366 we expected that his health would be restored to him.

Q. Had other men been losing as much time as he was, would you have kept them? A. No.

Q. Whether or not it was an inconvenience to you? A. I wouldn't no.

Q. Having a man losing so much time? A. No, we couldn't.

CROSS EXAMINATION by Mr. FitzGerald:

Q. You first saw him in '22? A. Yes.

Q. And how long a period did he work for you

at that time? A. In '22 he worked in New 367
London not over three or four weeks.

Q. Just a short time? A. Just a short time.

Q. Do you recall whether or not his work was steady during that period? A. It was not.

Q. And the next time you saw him was in 1926? A. '26.

Q. Do you recall the month he came under your supervision in '26? A. December.

Q. December 1926? A. Yes, sir.

Q. And how long did he stay under your supervision? A. Until 1929. 368

Q. What month? A. March.

Q. During the period from December '26 to March of '29, do you know whether or not his work was regular or otherwise? A. It was not regular.

Q. How about the first month he was on the job, December? A. He lost time.

Q. Much time, sir? A. I couldn't say; probably a couple days a week, or three.

Q. That is about typical of his full period of employment for you, just worked about half the 369
time? A. Just about half the time.

Q. How about his time during '27 and '8, that was just the same, was it? A. Yes.

Q. What was the nature of his duties at that time? A. '27 and '8 as a laborer.

Q. And his work was just about as irregular then as it had been during the first month? A. Yes.

Mr. FitzGerald: That is all.

(Recess.)

Dr. F. B. Hunt, re called for Plff., Direct.

370 DR. FRANK B. HUNT, re called:

Direct Examination by Mr. McNamara (continued):

Q. Doctor, I show you a paper marked Plaintiff's 4, April 19, 1932, KAG, and ask you if that is your signature? A. Yes, sir.

Q. What is that paper? A. Why it's an affidavit a statement To Whom It Concerns that I treated Mr. Newton Lambra since June
371 1920 and I found he suffered from rheumatism, chronic bronchitis and nervousness, and this condition incapacitated Mr. Lambra to a certain extent from doing his daily tasks.

Q. State what you believe the cause? A. I believe these disabilities were brought on by exposure to shell shock, poison gas and inclement weather during his war services.

Q. That was signed by you and sent to the Veterans Bureau? A. I don't recall sending it but that is my signature.

372 Q. That is dated Dec. 7, 1920? A. Yes, sir.

Q. And is that all your handwriting? A. Yes, sir.

Q. And it is your signature on it? A. Yes, sir.

Q. Having seen that, what do you say, did you treat him for rheumatism, chronic bronchitis and nervousness? A. I must have.

Q. And was it your judgment that those conditions incapacitated him from doing daily work? A. I must have—I signed my name to it.

Dr. F. B. Hunt, re-called for Plf., Cross.

Q. And did you then believe these disabilities 373
were brought on by shell shock, exposure to poison gas and inclement weather? A. I must have I signed my name to it.

CROSS EXAMINATION by Mr. FitzGerald:

Q. Do you have any personal recollection of this man? A. I recall his coming into the office occasionally. I couldn't recall treating him. I don't recall signing that paper.

Q. Were you in the service, Doctor? A. No, sir.

Q. Did you have any experience with shell 374
shocked men? A. No, sir.

Q. Did you have any experience with any persons who were gassed over seas? A. No, sir, not to my knowledge.

Q. You stated that it incapacitated him to a certain extent. Did you mean it totally incapacitated him? A. Well, as I remember him he was not able to work regularly. I didn't know the man before the war. I knew him only after.

Q. How frequently did he call on you from 375
June to December 1920? A. I couldn't say. I should say perhaps once a month or once in two months.

Q. And did he ever complain to you of having epileptic seizures of any kind? A. No, sir.

Q. Now Doctor, this rheumatism he complained of at that time, how did it affect him? What kind was it? A. Well, I don't recall treating him. I don't even recall his rheumatism, whether muscular or arthritis.

Dr. E. B. Hunt, re-called for Pltf., Re-direct. Discussion.

376 Q. You k recall he was not totally incapacitated? A. Yes, sir.

RE DIRECT EXAMINATION by Mr. McNamara:

Q. When you say he was not totally incapacitated, you mean from a medical standpoint? His disability did not completely incapacitate him from a medical standpoint?

377 The Court: Why did you sit silent and let that evidence go in? It is for the jury to say what total incapacity is.

Mr. McNamara: I wanted to have the Doctor explain just what he means by

The Court: You should have objected to the testimony any how. What do we care about it?

Mr. McNamara: The Doctor previously stated the incapacity was such he couldn't work steadily.

378 The Court: That is all right. We won't take our definition of what total incapacity is from the Doctor. We will take that from the law of the land.

Mr. McNamara: I want to show from the Doctor in view of the Court's ruling of what total incapacity is within the purview of this contract, if he was not able to work steadily he was totally incapacitated.

The Court: We know what the Court says total incapacity is and we won't linger

her to find out what some doctor thinks about it. The Supreme Court of the land has told us that and Congress has told us that. 379

Mr. McNamara: That is all.

ALFRED A. SOULIERE, called as a witness by the plaintiff, being duly sworn, testified as follows:

380

Direct Examination by Mr. Sylvester:

Q. Where do you reside? A. St. Albans, Vermont.

Q. How long have you lived there? A. About fifteen years.

Q. You hold some position with the Central Vermont Railroad? A. General foreman of the Car Department.

Q. How long have you held that position? A. About five years. 381

Q. Previous to that did you work for them? A. I have worked—held every position in that department prior to that from cabinet maker to gang foreman, departmental foreman, assistant general foreman and now I am general foreman.

Q. Did you at one time hold some city office too? A. I was Alderman three years and Overseer of the Poor one year.

Q. Do you know Newton Lumbra? A. Yes, sir.

382 Q. How long have you known him? A. Since the early part of 1924.

Q. Did he at some time work under you? A. He did from 1924 until 1926.

Q. In what department was that? A. That was in the car department.

Q. Describe to the jury, Mr. Souliere, the manner in which he did his work, his general appearance and how he conducted himself and what assistance was given him by yourself and fellow employees, if any. A. He began to work in the
383 early part of '24, I think it was February, and he worked there, if I remember right, as a laborer and helper—from helper back to laborer,—laborer to janitor, which is about the same thing only janitor is much lighter work, and the purpose of that was he was not working very long when we found out there was something the matter with him; that he was a willing worker,—he was trying to do what he could to do the work but somehow he just couldn't make it go, and it has been my experience that he come in the morning and
384 go to work when everything looked as though he would go along with his work but maybe in the forenoon or the afternoon he would ask permission to go home, and he would be sick and look all in. I think it was in 1926 he was given a leave of absence to go to the hospital, and I personally did all I could to help him out by changing him from one job to another for the simple reason that the fellow was willing and apparently he was sick, and being an ex-soldier—we have favored ex-soldiers and we still have two we favor the

same way today in my department. That is the 385
reason we have tried him every place and finally when we couldn't make it go, in talking to my superior, Mr. Noell, we thought we would try him in the other department as watchman. We didn't have no opening in that line, and he was transferred under Mr. Carroll who testified before me; that was in 1926, December I believe.

Q. These transfers that were made were from heavy to light work? A. It was lighter work.

Q. Each time? A. It was lighter work,— 386
lighter and lighter work all the time.

Q. Describe a little more in detail as to his appearance on the job,—how he conducted himself? A. Why he—his face appeared to be haggard like; tired and haggard;—he would come in the morning—he would appear to be all right, and he may come along a couple days and not be too bad, and then he would be sick and ask to be off. I don't know whether he had any fits while under my supervision. If he did have them it wasn't called to my attention. Whether he 387
would—if I had known he had any fits I would have dismissed him from service or reported him to the superior officer on account of the liability to the railroad.

Q. Why would you have dismissed him? A. On account of the liability to the railroad, on account of a man working on a staging, or on the floor and fall on the cement,—the railroad is liable.

Q. Could you tell by your observation of him

388 whether there's apparently something wrong with him? A. There's no doubt in my mind but what there was something wrong with him.

Q. You say you didn't know of his having one of these seizures while working under you? A. No, I didn't know.

Q. Was he working steadily? A. He was losing a lot of time.

Q. By reason of that fact, did you report to someone he was losing a lot of time? A. I did take it up with my superior, Mr. Nboll he was
389 losing, I should say by memory I would call it twenty five or thirty per cent of the time; maybe more.

Q. What was done, if anything, after you took it up with your superintendent? A. He was tried in the other department.

Q. Was he able at any time to compete with the other men in that same line of employment while under you? A. I didn't think so at the time.

390 CROSS EXAMINATION by Mr. Fitzgerald:

Q. Your first knowledge of Mr. Lamburn was in 1924? A. Yes, sir.

Q. You didn't know anything of him prior to that? A. No, sir.

Q. He worked for you from February 1924 to December 1926? A. Yes, sir.

Q. During that period, Mr. Soulière, was his attendance regular or otherwise? A. It was not regular; he was losing a lot of time.

Q. About how much time was he losing? A.

Why I haven't figured it out. I could if I looked 391
my records up, but it would be twenty five or thirty per cent of the time probably, we will call it that.

Q. When he went home, you testified he come in some days apparently feeling well and then going home during the day sometime? A. Yes, sir.

Q. Did he punch out when he did that? A. Oh, yes.

Q. How about his pay, did he ever get a raise or not? A. Why, he I wouldn't remem 392
that, but if what you might call it, if he got a raise, it was what you might call a blanket raise; if by agreements everybody got one or two cents more an hour, he would benefit with the others.

Q. As far as you know, he never got a raise of five cents an hour. Just these blanket raises as you testified? A. Yes, that is all.

393

H. G. NOELL, called as a witness by the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. McNamara:

Q. Your name? A. H. G. Noell.

Q. You are a resident of St. Albans? A. I am.

Q. Tell us just what your business is? A. Mechanical Superintendent of the Central Vermont.

394 Q. As such just what do you have charge of? A. I have charge of the maintenance of loco motives and cars on the system, mechanics who work on this equipment, and the engineers and firemen.

Q. And do the shops come under your supervision? A. They do.

Q. How long have you been in that position? A. Since May 1st, 1919.

Q. Did you know about the employment of Newton Lambra with the railroad? A. Yes.

395 Q. And when did his employment start there? A. In July 1922.

Q. Do you know how it happened he was taken on at that time? A. Well, prior to on July 1st, 1922 the shopmen throughout the country, that is the railroad shopmen throughout the country went on strike, so the Central Vermont men went out too, so at that time we hired practically a new force of men and Mr. Lambra was one of this number.

396 Q. Did you personally have anything to do with hiring him? A. No, I didn't hire him personally.

Q. Did he came to your attention sometime shortly after he went on the force? A. Well he was hired probably by one of the general foremen and he didn't come there wasn't anything about his case that came to my attention for a little while. He was shortly after he was hired he was transferred to New London, Connecticut. It is my recollection that he either didn't like it there or perhaps didn't fill the bill, and he was

transferred back to St. Albans. From then on 397
or shortly after that he was tried out a number of
different jobs as a mechanic's helper, and there
was some complaints about his work, so finally
he was put on laboring work.

Q. Will you go ahead and tell us just what his
experience there was with the concern, about
the various transfers and why they were made?
A. Well at the time he was hired it was at a
machinist helper's rate; that is, his work con-
sisted of helping a machinist; he was later trans-
ferred to a boiler maker helper and I think back 398
again to a machinist helper. That took him up
to some time in 1923 I think. Then he was em-
ployed or set back to a laborer; at that time to a
laborer in the freight car shops. He came under
Mr. Souliere who is the general foreman there.

Q. Do you know if these changes were made
because of the way he was doing his work? A.
Primarily, yes. Ordinarily a man would go up
in the scale, rather than reduce in the scale.

Q. These changes were all reductions? A.
Not all of them; he was transferred from one 399
helper's job to another in the first year or so,
trying to find some work he would fit in on.

Q. You knew at that time they were having
this trouble in placing him? A. Yes.

Q. After he got to Mr. Souliere's department,
how did he get along there? A. He was tried
on a number of different classes of work there;
laboring work,—then we had a vacancy in the
locomotive department as a watchman, so he was
then transferred to that department and came un-
der Mr. Carroll as general foreman there.

400 Q. While in Mr. Souliere's department was the office of janitor created there? A. I am not sure the office was created but we have that type of work—it is my recollection he was given that work.

Q. Is that lighter or heavier than the work of the other men in the department? A. That would be the lightest work we would have around the railroad shop.

Q. While he was doing that, he was then transferred over to Mr. Carroll's department as night
401 watchman? A. Yes. That, the watchman's job would be in about the same category as to the lightness of the work.

Q. How long did he stay on the watchman's job, if you know? A. Only a very short time, from December 8, 1926 to January 12, 1927.

Q. Do you know why he was taken off that work? A. I think he was taken off the work because of his irregularity. It is my recollection it was a night watchman's job and from the fact he loafed frequently and always made an inconvience
402 trying to get someone else in the night to fill his place,—so we took him off.

Q. Do you know what he was put on to at that time? A. I think he went back to ordinary laboring work,—sweeping the floor and cleaning up and so forth.

Q. During this period you personally came to know him, did you? A. Oh, yes.

Q. Was there something wrong with him that you could notice? A. Well you see I had reports from the departmental foremen, about his

being unable to do the work first; that is how it 403
first came to my attention, and I think I called him in the office to try to find out what was the matter. Then from then on he came in probably a half a dozen times in the remainder of the time that he worked for us, either to see me about a leave of absence because of his physical condition, or to tell me he was going to the hospital for treatment. It was perfectly apparent from the first time I saw him or called him into the office that he was not well.

Q. He was not well, you say? A. He was not 404
well.

Q. And did that condition—did that appearance continue all during the time he worked there? A. Yes, he never showed any improvement. He didn't look very badly at the time, but as you talked with him and you watched his actions around the shop, as we of course saw him around there, it was perfectly apparent that the young man was not able to work.

Q. Was he able to do any of the work that any 405
of the men in any of these departments are supposed to do,—reasonable able to carry it on? A. I don't think so.

Q. You knew about his being dismissed from the employment of the road? A. Oh, yes.

Q. And you knew why? A. Yes.

Q. Why was that? A. Well it was brought to my attention that he had an epileptic seizure in the shop, and so I felt that he should be sent to our company physician to make an examination which was done, and the company physician re-

406 commended that he not be continued in employment.

Q. Who was the company physician? A. Dr. Allen Davidson.

Q. And as a result of his recommendation, the man was dispensed with? A. Yes.

Q. Now have you at my request made a record showing the percentage of time this man was off during his employment with the railroad? A. Yes.

Q. Will you tell us what you find that to be?

407 A. Well, we have checked the clock rolls to ascertain just how much time he lost during the period he worked for us from July 12, 1922, to March 4, 1929. The first two months of '22, that is July and August, he worked every day. The month of September he lost 10 days, which is equivalent to 38 per cent of the time lost. October he lost 11½ per cent. November he lost 30 per cent. December he lost 30 per cent. January of 1923 he lost 8 per cent. February, 20 per cent. March, 38 per cent. April, 11½ per cent,

408 and then in the first 16 days of May he lost 4 days, which was 15 per cent. At that time there was a reduction in the number of employees in the railroad and he was laid off, from then until February 18, 1924, so that for the latter part of February he lost no time; that is, in that last week in February. March he lost 9 per cent. April, 8 per cent. May he lost 5 per cent, but he resigned in May to go to work for the Boston and Maine Railroad. He then came back and asked for employment again in December of 1925; re-

turned to work December 12 and he worked all 409
of that month and the month of January. Feb-
ruary he lost 1/8 of a day. That is wrong. Feb-
ruary he lost 9 days, which is equivalent to 35
per cent. March he lost 4 per cent. April, 13
per cent. May, 6 per cent. June, 1½ per cent.
July, 16½ per cent. August, I am sorry, that
is all wrong. I cannot follow my lines across
very well. February was 1/8 of a day out. He
worked all of February. He returned to work
on December the 12th and he worked the last of
December, and he worked all of January; he 410
worked all of February with the exception he was
out 1/8 of a day. March he lost 35 per cent.
April, 4 per cent. May, 13 per cent. June, 6
per cent. July, 1½ per cent. August, 16½ per
cent. September, 17 per cent. October, 2 per
cent. November he worked continuously. De-
cember, 6 per cent. 1926, January, he lost 4 per
cent. February he worked continuously. March
he lost 8 per cent. April, 17 per cent. May he
worked continuously. June, 5 per cent. July,
5 per cent. August 23 he was granted a six 411
months leave of absence, but up to that time he
had lost 8 per cent. He returned from his leave
of absence in September, on September 27 but he
was not able to work. He was still on leave of
absence but he had taken this leave of absence
to go to the hospital. November he had returned
to work and he lost 2 days, which was 8 per cent.
December he worked continuously. 1927, Janu-
ary he lost 2 days which is 8 per cent. February,
8 per cent. March, 4 per cent. April, 12 per

112 cent. May, 4 per cent. June, 26 per cent. He was then granted another leave of absence to go to the hospital and he was out from June to September, inclusive. October he had by then returned to work, and he lost 12 per cent of the remainder of the month. November 28 he was granted another two month leave of absence to go to the hospital, and up to that time he had been absent 38 per cent of the time. He returned January 30th. February he worked continuously. March he lost 8 per cent. April, 16 per cent.
113 May, 38 per cent. June, 100 per cent. He was out the entire month. July he lost 13 per cent. August, 30 per cent. September he worked continuously. October he lost 8 per cent. November, 4 per cent. December, 8 per cent. 1929, January he lost 18 per cent. February, 10 per cent. March, 25 per cent, and on March 4, 1929 he left the service.

Q. Now Mr. Noell, was it usual or customary for your concern to keep a man employed who lost time as this man did? A. No.

114 Q. And was it usual when a man was on a job, if he couldn't do the work that he would be put on something lighter and transferred around the way this man was? A. We often times do that. We hire a man in good faith and if we think a man is willing and wants to get along, we try to find some work that is suitable for them, but I am frank to admit that we don't often change them as often as we changed Mr. Lambra.

Q. There was some reason then the road had for keeping him on in spite of the fact he had to

be changed in this way, was there? A. We kept him on because his case was unsettled. He was an overseas veteran and we felt that he needed all the help we could give him. 115

Q. And you tried to do it? A. Oh, yes.

CROSS EXAMINATION by Mr. Fitzgerald

Q. Was there an application filed by Mr. Lambros when he applied for work? A. Yes.

Q. Have you that with you? A. I haven't it with me. I think it is here as part of the record.

Q. Do you know who has it? A. I don't know. It was my understanding that you had asked for all of our office records, and as far as I know. 116

Q. I did. I was trying to ask you if you had it with you? A. No, I haven't it with me.

By the Court:

Q. Have you sent it to the Government? A. I understood you had asked for them through Mr. Berryman and I saw him in my office last night taking out some records, and from what he took out, I think he must have everything. 117

By Mr. Fitzgerald:

Q. He was first hired as a machinist's helper? A. Yes, that is right.

Q. What are the duties of a machinist's helper, Mr. Noell? A. Well his duties usually cover what the title signify, that is, he helps the machinist. A machinist would do many different kinds of work, and it would all depend on what machinist he was assigned to, just what his duties would be; it would be a hard thing to explain.

418 Q. Would it necessarily involve very heavy work? A. It might.

Q. And it might also be light? A. Not usually. A machinist that requires a helper—it is because of the heavy work, you see.

Q. How long was he kept as a machinist's helper? A. Well he was kept about two weeks until July 27. He was then assigned to boiler maker's helper.

Q. He worked from July 12 to July 27, 1922, and then he went in as a boiler maker's helper? A.
419 As a boiler maker's helper down to New London Connecticut.

Q. When he returned to St. Albans, in what capacity did he serve? A. As a boiler maker's helper from then until May 16, 1923.

Q. And he returned when, the middle of September? A. From New London you mean?

Q. Yes. A. He returned from New London August 17; he was there about two weeks.

Q. Which is the heavier work, machinist's helper or boiler maker's helper, or are they about
420 the same thing? A. They would be about the same.

Q. How about his employment in September and October 1926?

The Court: Do you expect to change this any? The witness has been all over this every month.

Q. I wanted to make sure when he came back? A. According to my record he returned from a six months leave of absence which was given him on August 23,—it is apparent he didn't stay out

the six months,—he returned on September 27, 421
which would be four days over a month.

Q. He returned in September and then worked— A. September 27, 1926.

Q. Do you know anything about what he was paid as remuneration? A. I have no record of it except we have all the payroll records.

Q. They're also coming down with Mr. Berryman? A. I understand so.

Q. He resigned a number of occasions voluntarily, did he? A. He resigned once.

Q. When was that? A. That was on May 12, 422
1924.

Q. And any other time that he left the service, it was just on leave, is that right, until the final termination? A. He resigned once, laid off once and granted three different leaves of absence.

Q. Now when you have a lay-off as occurred in this case, then did you recall the men or if they come back in your employment do they have to reapply for a position? A. Well at that time—I am not quite sure, but at that time I think if a man was laid off, he was put on to what we 423
would call "put on call," and he would be called back as required. The rules are a little different in that respect now.

Q. Mr. Noell, was Mr. Lumbra's work fairly satisfactory from the earlier days of his employment? A. Do you mean were they—were his services satisfactory when he was first employed?

Q. Yes. A. Well I don't think I can answer that question.

Q. You don't recall that? A. I might ex-

424 plain it by saying it was because of so many new employees at that time, it would be some time before you could say a man was not doing what we called standard work.

Q. This janitor work that he did there, is that a regular position there? Is there someone there doing that work all the time? A. Oh, yes.

Q. This schedule of work you read, Mr. Noell, for 1926, how did that compare with the attendance of the other men there?

The Court: We won't concern ourselves about the other men.

425 Mr. Fitzgerald: I think it is pertinent to show that his work was like he testified other men could not lose the same amount of time.

Q. Does the sheet you have there take in all working days, or does it also take in days the plant was not working? A. The sheet we have takes in only the days the plant was operating; that is, the days he would be offered work.

Mr. Fitzgerald: That is all.

426

FREMONT LUMBRA, called as a witness by the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. McNamara:

Q. Your name is Fremont Lumbra? A. Fremont Lumbra.

Q. And you are a brother of Newton Lumbra? A. I am.

E. Lambda, for Plff., Direct.

Q. And where do you live now? A. Berk- 127
shire, East Berkshire.

Q. Did you live in Montgomery? A. I did.

Q. When? A. Up until about nine years ago.

Q. You lived around Montgomery up to the time Newton went away to the war? A. Yes.

Q. And you were there when he came back from the war? A. Yes.

Q. Did you work with him some before he went away to the army? A. Yes; I did.

Q. Where was that? A. In the woods.

Q. And what year? A. Why I think it was 128
1914 '15.

Q. What were you doing in there? A. Lumbering; cutting logs.

Q. Was that the place where this road was built in? A. Yes.

Q. And the lumbering done there that winter? A. Yes.

Q. How long were you there on that job? A. I started in there the early part of the summer, and I was there all winter.

Q. Was Newton there during all that time? A. 129
Yes.

Q. Was he there all the time you were there? A. Yes.

Q. What were his duties? A. Cutting logs; sawing; cross cut saw, and chopping.

Q. What kind of a workman was he? A. He was a good workman.

Q. Lose any time? A. No.

Q. Did he have to have any help to do what he was supposed to do there? A. No.

430 Q. Or was he good and capable? A. Oh, yes.

Q. Did you know about his other work before he went in the army, other types of work and other jobs he held? A. Well I, yes, I know of other jobs he did; that is, worked different jobs.

Q. What kind of a workman was he, steady or unsteady? A. Yes, he was a steady workman.

Q. Lose much time? A. No.

Q. Have any illness that you know of? A. No.

Q. Any physical disability? A. No.

431 Q. How was he for activity? How he got around, describe how he appeared? A. He was a good active man, a good spry man and worked.

Q. You saw him, of course, about the time he went in the army? A. Yes.

Q. When did you see him after he got back from the army? A. I saw him at the station at East Berkshire.

Q. Was there any change in him? A. Why I couldn't tell much just then. He was a little

432 lame on one foot.

Q. How about his expression, how did he look? A. He didn't seem to be so active.

Q. Describe just how he looked right there when he come back, or shortly after when you got a chance to see how he did appear? A. He looked to me just as if he didn't have much courage. That is, he wasn't so active as he was before he went to the army. You see I didn't work with him any after he got back.

Q. Did you see him more or less? A. Yes.

Q. Where was he living at this time? A. 433
Montgomery Center.

Q. With whom? A. With mother.

Q. You were not living at the same place? A. I was living up above.

Q. Do you know how long it was before he started in trying to work? A. It might have been three or four months I guess.

Q. Where did he go to work then? A. I think he went to work there to the Nelson Hall Veneer Mill.

Q. During those three or four months, did he 434
do anything at all? A. Not much I guess, no.

Q. Did his condition improve any during that time? A. It didn't seem to very much.

Q. Then you saw him about the time he went to work for the Nelson Hall people? A. Yes.

Q. Were you working at the same place? A. I was working at the same place nights.

Q. He was on the day shift? A. Yes.

Q. Do you know what his work was when he started in there at this time? A. Well I think 435
he was working around on the vat, handling blocks, logs.

Q. Did he stay there long? A. I couldn't say just how long he stayed there.

Q. Do you know if he did change his employment later on? A. Yes, I knew he did.

Q. What type of work did they give him then? A. They put him inside I think.

Q. You were on the night shift and he was on the day shift,—did you meet some times going and coming? A. I would have to get there

nights before they quit, and in the morning the help would always get there before I quit.

Q. Were you foreman of the night shift? A. Yes.

Q. Were you able to tell whether or not Newton was working regularly? A. Sometimes I would see him when he was to work and other ways I knew just about how much time he was putting in because I had to shift the time cards.

Q. How steady was he working there? A. He wasn't working steady.

Q. Have you a judgment as to how much time he was losing? A. I haven't got any record of it but he didn't put in no half of the time in that time.

Q. Was that so during all that period after the war? A. Yes.

Q. Do you remember about when he got through there? A. Well he got through there I think and went to Richford, or came down to St. Albans; I don't remember. It has been so long ago.

Q. But you do know he was losing about half the time during the time he was working there in Montgomery? A. Yes.

Q. After he once moved away, he didn't live back there in Montgomery any more? A. No.

Q. So you have seen him as he come to see you or you have been to St. Albans? A. Yes.

Q. Have you seen him in these fits? A. Yes.

Q. Do you remember when you saw the first one? A. Well now it was up when I was living at Richford,—why I should imagine it was around 1924 or '5 I think.

Q. And which do you think it is? Have you a judgment as to which year it is more apt to be, whether '24 or '25? A. I think it is in '25; I think it is. 439

Q. What time of the year? A. It was the first of January.

Q. 1925? A. Yes.

Q. Tell us where he was and describe just how this attack was? A. He came up to my place, he came up to stay over night, and at dinner time he sat at table just across from me and I noticed he wasn't eating much. I asked the boy what the matter was, he didn't seem to eat? I see he acted a little different, and he said he wasn't feeling good, and he got up from the table and sat down in my rocking chair there, and I guess he wasn't there over two minutes before he was into one of those spells. 440

Q. Describe how he acted? A. He stiffened right out, his hands and feet and legs, and froth run at the mouth, and his eyes well his eyes looked funny; kind of bulged out; and that afternoon I guess he had six or seven, lasted him fifteen or twenty minutes, some of them half an hour. The fact of it was he had them about all night. I got up in the night and went into his room, and he was into one, and I stayed there a few minutes and spoke to him and he asked for some water, and he would look funny when he come out of them; looked—well I don't know, as if he was lost,—wild;—didn't look right. 441

Q. How long did he stay there at your place that time? A. I was going to say I give him this

442 glass of water and he says to me—"be sure to wake me up in the morning so I can take the train and go home,"—and he came home that morning on the train.

Q. After he had the first one that day, what was his condition all the rest of that day around there? You say he had several other attacks, but between these attacks, what was his condition? A. In between he didn't look right; some of them he had just a few minutes in between; he would be right into another one you know.

443 Q. Did he move around any or just lie there and rest between the spells? A. Well he would lie on the couch some and try to get around.

Q. Have you seen him in some of these at other times? A. I haven't.

Q. How has his condition been since that time in his general appearance and looks and the way he got around and all that sort of thing? A. Well his appearance hasn't improved any I don't think.

444 Q. And has it improved any since he got out of the army? A. No.

Q. His general appearance is about the same now as it was then? A. Yes.

Q. Now these spells he had that day, did he become unconscious each time, in each of these attacks you told us about? A. Yes.

Q. And would he froth at the mouth? A. Yes.

Q. And had all these same effects each time? A. About the same. Some of them he would have—he would thrash around a little more than others, and others he would stiffen right out.

CROSS EXAMINATION by Mr. FitzGerald: 445

Q. You stated, Mr. Lumbra, you saw him when he came home from the army? A. I did.

Q. And his appearance had not changed greatly except that he was lame? A. Oh, you could see that his appearance had changed, yes, some, and he was lame.

Q. On direct examination you said there wasn't much change except he was lame in one foot. Then you have stated his appearance today isn't much different than when he came out of the army;—so his general appearance is as it 446 was when he went in, is that correct, except he is older? A. I stated he hasn't improved any.

Q. But has he retrogressed,—has he grown worse? A. Well it isn't improved; he isn't any better than he was.

Q. I am speaking of his general appearance more than his physical condition, Mr. Lumbra. How is his general appearance today,—isn't it about the same as when he come out of the army? A. I cannot see as there's much difference.

Q. When you and he were both working in 447 the Nelson Hall plant, you didn't supervise his work in any way? A. No.

Q. You were primarily employed as watchman, were you? A. I was night foreman and watchman.

Q. You were in charge of the dryers, weren't you? A. Yes.

Q. And the rest of your duties were as watchman? A. Not all of the time, I didn't watch. There was a watchman some of the time beside me.

448 Q. During this attack during the year 1925, how was his breathing during those attacks? A. Well you couldn't see him breathe very much when he was into them.

Q. Just was there, quiet, so far as his breathing is concerned? A. Yes.

Q. As to his muscles,—you said they were drawn, rigid? A. He would stiffen right out,—his hands and feet.

Q. How long would that rigid condition last? A. Why I don't know; it would last probably
449 fifteen or twenty minutes.

Q. He would be rigid that length of time or from the time he started on that attack until he recovered? A. I don't understand.

Q. Was he rigid these fifteen or twenty minutes, or was it from the time he got the first warning until it passed? A. He might not have been stiffened for fifteen or twenty minutes, but he wouldn't come out for fifteen or twenty minutes.

Q. How long was he rigid, stiffened up? A.
450 I couldn't say exactly.

Q. Three or four minutes? A. Longer than that.

Q. Now you said the attack lasted between fifteen and twenty minutes. You say it is longer than three or four and not fifteen. Where do you say the rigidity passes and he relaxes? A. That is a hard question to answer. I didn't look and see. I know he would stiffen right out and he wouldn't come out of it probably in fifteen minutes.

Q. There was a point during this attack where he did relax, wasn't there? Where the muscles ceased to be rigid and he relaxed? Somewhere in there that happened, didn't it? A. Yes, when he come out of it he would relax, sure. 451

Q. How was his breathing after he relaxed? A. He would breathe funny;—he didn't seem to breathe naturally.

Q. Was it heavy and labored? Slow and deep, or how was it? A. I don't know what you would call it exactly.

Q. Could you hear him breathe then? A. Well, no, you couldn't hear him breathe. 452

Q. He was gasping for breathe, was he, or was he? A. He would kind of—when he would come out of it, you know, he would kind of—just as if he was holding his breath, you know,—and then he was all wilted.

Q. That deep breath and then his breathing was practically normal, after it, wasn't that it? A. It would be after a few minutes.

Q. While in this attack his breath—you had to listen closely to hear it at all, is that right? It was as though he was holding his breath, is that right? A. You could see him breathe but you couldn't hear him breathe. 453

Mr. Sylvester: That closes our case with the exception of our doctors who will be here at two o'clock.

The Court: You have done very well. Come in, gentlemen, at two o'clock, as an accommodation to the doctors. (11:45 a. m.)

454 (Tuesday, Apr. 19, 1932, 2 P. M.)

CHARLES S. SUMNER, called as a witness by the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Sylvester:

Q. What is your full name? A. Charles Stewart Sumner.

Q. And residence? A. St. Albans, Ver-
455 mont.

Q. How long have you lived there? A. All my life,—forty years.

Q. At some time did you hold a city position there? A. Yes, sir, until last August I was City Manager for eight years.

Q. During the time you were City Manager was there more or less construction work going on there? A. From 1927 until last year we had a very big program.

Q. Do you know Newton Lambra? A. I do.
456 Q. How long have you known him? A. Why I have known him approximately ten to twelve years.

Q. Did he at some time come to you and request a job of you? A. He did.

Q. Did he have some letter with him that you got from someone? A. No, sir.

Q. Did you give him employment at that time? A. I did not.

Q. Were you hiring help during that period of time? A. Yes, sir, we were.

457

Q. What was the reason you didn't hire him? A. I had seen him have a fit and knew he had fits, and there was a liability there.

Q. And by reason of the fact it would subject the City to liability, was the reason you didn't hire him? A. Yes, sir.

Q. Do you know of any work he could have done without more or less danger to himself? A. Nothing, sir.

CROSS EXAMINATION by Mr. FitzGerald:

458

Q. What year was this in, Mr. Sumner? A. The construction started in 1928 and lasted until last year.

Q. When did he apply for work? A. 1929 was the big year.

Q. And do you know anything about his physical condition prior to 1929? A. Nothing that I had seen. I had seen him have fits since then but not before.

Q. You didn't know anything about his health prior to that time? A. Just what I have heard.

459

Q. Of your own knowledge? A. No, sir.

Mr. FitzGerald: That is all.

DR. HOWARD H. JOHNSON, called as a witness by the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Sylvester:

Q. State your full name and address? A. Howard Horace Johnson, St. Albans, Vermont.

460 Q. You are a practicing physician? A. I am.

Q. Where did you receive your training? A. The University of Vermont.

Q. How long have you been practicing medicine? A. I graduated in 1916.

Q. You have been in St. Albans since then? A. Since July, 1916.

Q. At some time did you see Newton Lumbra? A. I did.

Q. When was that Doctor? A. About May,
461 1931.

Q. Where did you see him? A. I saw him in Kelly's Restaurant.

Q. Were you called there to see him? A. I was in there having lunch and as I went out of the restaurant they called me back, saying there was a man having some sort of a bad spell.

Q. You describe to the jury just the condition you found him in? A. I found him laying on the floor in a convulsion which seemed to be epileptiform in nature. He was frothing at the
462 mouth and biting his tongue, and unconscious.

Q. What did you do for him, Doctor? A. I put the handle of a knife or something between his teeth, so he couldn't bite his tongue, and waited until he come out of the convulsion, or practically out of it, and then I left.

Q. Was there anything further you could do for him other than what you did? A. Nothing. I offered to take him home but someone else said they would take him home.

Q. Do you know of any cure for epilepsy? A. Any cure? No, I do not.

Q. Do you know of any work that this man could do, or anyone could do that is subject to epilepsy, without injuring themselves? A. Well no, I don't know that I do. 463

CROSS EXAMINATION by Mr. FitzGerald:

Q. Doctor, did you ever see Mr. Lumbra except on that one occasion? A. I beg your pardon?

Q. Repeated. A. I think perhaps I have seen him. I don't remember so much about him; —I have treated his family but usually I think he has been away. 464

Q. Did you ever treat him except on that one occasion? A. No I don't remember that I did.

Q. When was it that you did treat him? A. This time that I saw him?

Q. Yes. A. I didn't treat him. I only saw him in the convulsion and stayed with him until he was out of the convulsion.

Q. When was that? A. May, 1931.

Q. May of 1931? A. Yes.

Q. Did you ever see him in any similar attack at any other time? A. No, I haven't seen him very much since or before. 465

Q. Doctor, might that not have been an epileptic seizure? Might it have been from some other cause? A. It had every appearance of being epileptic.

Q. But it might have been from some other cause? A. I would hate to say it couldn't have been.

Q. Do you know of seizures caused by hysteria, Doctor? A. The fits may be caused by hysteria;

466 convulsions;—in fact there are many things might cause convulsions, but usually they don't bite their tongue in hysteria.

Q. Wouldn't it be difficult in seeing a patient in just one attack and not treating him and getting his history, to make a diagnosis as to what caused that attack? A. I wouldn't attempt to make a diagnosis—positive—without seeing him more or getting his history or something.

Q. Then you don't mean to positively state it was an epileptic attack, Doctor? A. It had
467 every appearance of being epilepsy to me. I called it epilepsy without a question in my own mind. I would hate to go on treating the case without seeing him more and making more of a study of the case.

Q. You couldn't state it was, could you, Doctor? A. It had every appearance of being.

Q. Would excessive use of alcohol cause epileptiform seizures? A. Would it cause?

Q. Yes. A. I think it is given as a possible cause of epilepsy, though it isn't rated as high as
468 many other causes.

Q. But that might cause it? A. I suppose it could cause it. There are many things that could cause it,

RE-DIRECT EXAMINATION by Mr. Sylvester:

Q. Which would be the more probable cause, a severe shock or excessive use of alcohol? A. I think different writers sort of stage different things, as—I looked up in Tyson's Practice of Medicine,—late encyclopedia, and the speak of in-

469

jury as causing the most number of cases; that is, the history of injury in these cases far exceeded all other; fright came next and alcohol next.

RE-CROSS EXAMINATION by Mr. Fitz-Gerald:

Q. Injury to what part of the body, Doctor? A. Not any special—it might be injury to the head, or possibly injury to any part of the body that would cause extreme nervous condition.

Q. Isn't it true that head injuries are one of 470
the principal causes for epilepsy? A. I beg pardon?

Q. Repeated. A. Head injury is one of the causes; is classed as one of the causes.

Q. One of the principal causes? A. Yes.

DR. ALLAN DAVIDSON, called as a witness by the plaintiff, being duly sworn, testified as follows: 471

Direct Examination by Mr. McNamara:

Q. Your full name is Allan Davidson? A. Yes, sir.

Q. You are a practicing physician and surgeon in the City of St. Albans? A. Yes, sir.

Q. And have been for how many years, Doctor? A. About 36.

Q. And you are chief surgeon with the Central Vermont Railroad? A. Yes, sir.

472 Q. And are you on the staff of the hospital at St. Albans? A. I am.

Q. What is your official position there, Doctor? A. I am a surgeon on the staff of the hospital.

Q. Where did you take your medical training? A. McGill College, Montreal.

Q. You studied at some foreign Universities too? A. Some.

Q. What were they? A. Principally London and Edinborough.

473 Q. Did you take some study in Vienna? A. Slight; a short time.

Q. Were you called to the Railroad offices sometime in '29 to see Newton Lumbra? A. I was.

Q. Do you remember about what time it was, Doctor? A. I should think it was about the first of March, 1929.

Q. Where did you find him that day? A. Well, if my memory serves me right, he was in the First Aid Room.

474 Q. In what condition was he, Doctor? A. He was in a comatose condition, sleeping profoundly.

Q. What was he suffering from at that time? A. They told me he had just had a very severe convulsion. The convulsive part was over when I got there, but he was still sound asleep.

Q. His condition indicated he might have just had a convulsion, did it, to you? A. Yes, sir.

Q. Did you examine him somewhat further at your office? A. I think I did later; a day or two later.

Q. As a result of your examination at the office, together with that one in the railroad office, did you determine what his trouble was? A. I did. 475

Q. And what was it, Doctor? A. My diagnosis was epilepsy.

Q. Now, Doctor, do you know what causes epilepsy? A. No, I don't know the ultimate cause of it.

Q. Can it be definitely determined in any individual patient? A. I don't think that investigation has arrived at a conclusion of what the ultimate cause is. 476

Q. Is there any cure for epilepsy that medical science knows,—any positive cure? A. Not that I know of.

Q. Is a severe shock given as one of the probable causes of epilepsy? A. Yes, it is spoken of as a probable cause.

Q. Assuming that a man suffered a severe shock from a high explosive shell concussion which threw him several feet and left him in an unconscious condition and he was placed in a hospital and began suffering nervous reactions, with pain in the head, perspiration standing out on his forehead, and overcome with weakness so he would have to sit or lie down, and that these spells continued and increased in intensity for a number of years, three or four years, until finally they became so bad he went into convulsions of the type you saw him in, would you say the condition you found him in in '29 was the reasonably probable result of that concussion he suffered in the army? A. Well, I should think that the 477

478 condition I found him in was probably in a measure due to the experience he had gone through.

Q. And have you some theory, doctor, or is there a medical theory on which you base that judgment? A. Why I think that some individuals are born with a nervous system that is not capable of resisting the stress and pressure of social life social conditions, and if those conditions are aggravated or increased, there comes a point at which the tension reaches a
479 point where they cannot stand it any longer, and you get a break. Frequently that break takes the form of a convulsion.

Q. May the break be indicated by something else than a convulsion in the first instance? A. Yes.

Q. And gradually they grow up to the convulsive type? A. I think so.

Q. Now doctor, was this man a safe man to have around working for the Railroad at the time you examined him? A. No, I didn't con-
480 sider him safe.

Q. Did you order the road to dispense with his services? A. I recommended his dismissal.

Q. Do you know any work connected with the Railroad which would be safe for this man to try to do? A. No, I do not.

Q. And assuming that this man's education was limited to that of the Graded School, and his only activity has been that of a laboring man, do you know of any type of labor that he could properly perform, with safety to himself in the condition he now is or was at the time you saw

him? A. No, I don't know of anything he could 481
do where he would be safe from injury.

Q. And has that been the case, Doctor, during all the period that he has suffered with this trouble? A. Why so far as I know.

Q. That is your judgment on it? A. That is my judgment.

CROSS EXAMINATION by Mr. FitzGerald:

Q. Doctor, you said that shock is one of the causes of epilepsy. Are there other causes? A. Yes. 482

Q. Is head injury one of the causes? A. Yes.

Q. Excessive use of alcohol? A. I don't think excessive use of alcohol in the individual is a frequent cause of epilepsy.

Q. Might it not be a cause? A. In my experience I don't think I have ever seen a case.

Q. May excessive use of alcohol cause epileptiform seizures which are similar to epilepsy and not be true epilepsy? A. I haven't seen such a case; possibly it is true. 483

Q. Doctor, you testified in answer to the hypothetical question that Mr. Lumbra's convulsive seizures were probably caused by this shock which he received in 1919 or 1918? A. Yes.

Q. Doctor, until such time as the convulsive seizure evidenced itself, could Mr. Lumbra have worked without endangering his health? A. Well I understand he had nervous attacks previous to that which made it impossible for him to hold a job,—to continue in his work.

484 Q. If a person received the injury which was covered in your first hypothetical question and subsequently had attacks of nervousness, and worked at various occupations over a period of years, and then began having convulsive seizures, up until the time he had that seizure, Doctor, would he have injured himself or endangered himself in any way by continuing to work?

Mr. McNamara: I object to that. That is not based on any evidence in the case and not a proper hypothetical question.

485 The Court: I think it is based on the testimony we have had.

Mr. McNamara: The testimony is this man attempted only one type of work before the period he went into the convulsive type;—that was the work at the mill where they transferred him from one department to another, to lighter work; that he did not work steadily, although the question would lead the witness to believe it was steady, and finally he had to give up that work.

486 That is the only evidence in this case prior to the time the Doctor knew about him at the Railroad.

Q. Repeated.

The Court: The question indicates he had gone on for a period in employment without difficulty, but I guess I will let him ask it just the same.

Mr. McNamara: May we have an exception noted.

The Court: It cannot be worth very much. He may ask it.

Q. Repeated. A. Well I think the work would 487
have been a strain on his nervous system.

Q. Was there any work that he might have done, Doctor, that would not have been a strain? A. Well, I couldn't answer that. There might have been something but I should think any work would increase the tension which ultimately led to the break.

Q. Isn't it true that persons who are nervous are apt to spend too much time thinking of themselves, and if they are employed, their mind is occupied and it is really beneficial rather than 488
detrimental?

Mr. McNamara: I think that is entirely immaterial and not cross examination and doesn't fit the case in question in any way, shape or manner. It is a hypothetical question entirely outside of this case.

The Court: Let him ask it just the same.

A. I should like you to advise what you mean by nervousness?

Q. Doctor, the nervous condition you have 489
told that this man had,—you were told as to a certain nervous condition he had, were you not? A. I heard it in the testimony, yes.

Q. In arriving at your diagnosis and your subsequent testimony after your examination of this man in your office, did you take a history of this man then? A. Yes.

Q. What did he tell you? A. He told me he had these nervous conditions that he couldn't control and that he couldn't go on with his work.

490 Q. How long did he say he had been having those attacks? A. When he went to the hospital, after his injury in France.

Q. These convulsive seizures? A. No, these nervous attacks.

Q. What kind of attacks did he say he had, Doctor? Describe them. A. He said he was uncontrollably nervous and couldn't rest or sleep.

Q. If the man had attacks, Doctor, of dizziness, would that be attributable to nerves? A.
491 It might be or it might be due to other causes.

Q. If he had attacks of headache, would that be attributable to nerves? A. It might be or it might be due to other causes.

Q. It could be due to other causes? A. Yes.

Q. And if a person—if things went black before them, would that be attributable to nerves, Doctor? A. Possibly.

Q. It might be attributable to many other causes? A. Yes.

Q. And the only history of nervousness which
492 you have was such as we have described to you, which might have been caused by other things? A. Possibly.

Q. If during the time he had such symptoms as we have just described, could he not have worked at many occupations Doctor without endangering his health? A. That is a question which I would not undertake to give an ultimate answer to. Personally I think he was handicapped in anything he might have attempted to do.

Q. How severe a handicap, Doctor? A. Well, he had lost his own confidence in being able to do anything. 493

Q. Didn't loss of confidence become evident after the first convulsive seizure? A. Well I think from the history it manifested itself before.

Q. If the man believed that these attacks were going to wear off, would that indicate loss of confidence, Doctor, so long as he had that belief? A. If he had that belief then it ought to help him. 494

Q. It should have helped him to work too, should it not, Doctor? A. Yes.

RE-DIRECT EXAMINATION by Mr. McNamara:

Q. But if he tried to work and these attacks continued and kept growing in intensity and in frequency, then was the work something that was injurious to him? A. I think so.

RE-CROSS EXAMINATION by Mr. Fitz-Gerald: 495

Q. What is the greatest danger to a man who is suffering from epilepsy if he works? A. Well, he is liable to have a convulsion and he might fall and injure himself, or he might get into machinery; he might fall underneath a moving train, or on to a hot stove, or on to a forge.

Q. His greatest danger is the injury he might receive in the throes of this convulsion? A. Yes.

Q. The fact he is occupied by working does

496 not effect that convulsive seizure at all, does it? In between seizures he is perfectly capable? A. Perfectly.

Q. And it does not hurt him at all to work, does it? It is just the danger of injury because of these convulsive seizures? A. Yes, I think that is true.

RE DIRECT EXAMINATION by Mr. McNamara:

Q. Doesn't fatigue, Doctor, tend to increase
497 these seizures? A. I should think it might. I wouldn't absolutely say so; but I should think so.

Q. So if a man could rest, he would be less apt to have them so frequently, is that so? A. I believe that.

Q. Isn't it also a fact, Doctor, with a great number of cases of these epileptic seizures, that where the subject becomes tired, so he has them with great frequency and will have a number of them in a short period of time, that they will eventually break down the brain? A. It fre-
498 quently does impair the mentality.

Q. So that work which brings on the repented seizures is bringing that person probably to a state where there will be absolute insanity in time, is that correct? A. I should say impairment of mental powers.

RE-CROSS EXAMINATION by Mr. Fitz-Gerald:

Q. What percentage of cases of epileptics result in insanity? A. I don't know; I couldn't tell.

Q. Isn't it a very small percentage? A. I think comparatively small. 499

Q. Isn't it true that many epileptics are carrying on day after day? A. Quite true.

DR. BYRON HERMAN, called as a witness by the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. McNamara: 500

Q. You are also a practicing physician in St. Albans? A. I am.

Q. You are the Government examiner for the United States Veterans Bureau? A. I am.

Q. As such did you see Newton Lumbra at some time? A. Yes.

Q. In your practice there, when did you first see him? A. I couldn't say exactly but a number of years ago.

Q. Sometime early after the war? A. Yes. 501

Q. Did you treat him at that time, do you know? A. No, I did not.

Q. Do you now have any independent recollection of what his trouble was at that time? A. I don't think he had much trouble at that time when I first saw him.

Q. Do you remember definitely whether he did or not, Doctor? A. I couldn't say exactly.

Q. Later on you started treating him, didn't you? A. Yes, I did.

502 Q. Do you remember when that was? A. I couldn't say exactly; it was at the request of the Government;—they have the record.

Q. Probably around 1926 or '7? A. Why, somewhere in that vicinity.

Q. And for what did you treat him? A. Epileptiform seizures.

Q. Was that grand mal or petit mal? A. I thought it was grand mal.

Q. Some times is it hard to distinguish between the two? A. Why, usually not.

503 Q. Usually there is a very well defined difference, isn't there? A. Usually, in most cases.

Q. Will you explain to the jury just what the two of them are? A. Well, petit mal is a—the greatest difference is it is a slight seizure while the grand mal is a more prolonged affair in which the patient becomes comatose,—sleeps, and is unconscious.

Q. Have you see Newton Lumbra in some of the grand mal seizures? A. Yes.

504 Q. Rather frequently? A. Quite a number of times.

Q. Was there anything you could do for him, Doctor? A. Nothing that I did do.

Q. You did all that you knew how to do? A. All I knew of to do.

Q. Is there any cure for grand mal that you know of? A. Not that I know of.

Q. Are there some aids that are given, some treatments and some drugs that help? A. Yes, that are of benefit.

Q. You have given Lumbra some of those, have you? A. Yes. 505

Q. Have they made any appreciable difference in his condition that you have been able to notice? A. Well, that is theoretical; he still has the seizures.

Q. And with as much frequency as before you started giving them? A. Yes.

Q. Does petit mal sometimes develop into grand mal Doctor? A. I don't believe so.

Q. Are you sure that it doesn't? A. No, I am not sure. 506

Q. It might possibly do that? A. It is possible.

Q. And is an extreme shock apt to bring on grand mal seizures Doctor? A. It is classified as one of the causes.

Q. One of the chief causes? A. Yes, one of the chief causes.

Q. And is shock of the type of a man being thrown by the concussion of a high explosive shell a type of shock that would be apt to bring on this type of seizure? A. It is possible. 507

Q. Rather probable? A. Well, no, I wouldn't say probable.

Q. Well if the person developed grand mal seizures, the true epileptic seizures, after having undergone such a concussion, would you say that the cause of the epilepsy was very probably the concussion through which he had gone? A. I would say it was probable—possible.

Q. Would you say, Doctor, that petit mal, the lesser seizures that are somewhat similar but

508 lesser in degree and don't bring on unconsciousness, that they also are a probable result of an extreme shock? A. A possible; I don't say they're probable at all; they're possible.

Q. Assuming that a patient had the petit mal seizures after having undergone a severe concussion, being thrown several feet and picked up unconscious and remained unconscious for some little time after the concussion and then developed the petit mal seizures, would you think they were a probable result of that concussion? A. I
509 would say they were a possible cause of it.

Q. You would have to know the patient's former history? A. I don't know the cause of epilepsy.

Q. Does anyone know what it is? A. No, sir.

Q. There are various theories, aren't there, Doctor? A. Yes there are a number of theories.

Q. Assuming that a man who is subject to these grand mal seizures had such education that the only work he could do was that of an ordinary laborer, is it safe for him to try to work
510 when subject to these attacks? A. I believe so.

Q. At what type of work, Doctor? A. Why any sort of work where he would not be in close contact with machinery; that is, any form of labor he was able to do.

Q. Do you think it would be safe for him to try to dig ditches? A. Why, I think it would be.

Q. Do you think a fall from the top of a ditch into the ditch in these seizures would not be harmful? A. It would be dangerous.

Q. It would be dangerous, wouldn't it?

Mr. FitzGerald: I submit this is cross examination. 511

The Court: Most all of it is.

Mr. FitzGerald: I object.

The Court: I think as you have sat here so long, I will rule as a matter of discretion it may go on. That is all we have had since the trial started;—on either side.

Mr. Fitzgerald: Exception.

Q. Could such a man safely work around a machine shop or railroad shop, Doctor? A. No, sir. 512

The Court: That is more cross examination.

Mr. McNamara: If the Court please, this Doctor is a Government doctor.

The Court: Suppose he is? That doesn't change the law of evidence.

Mr. McNamara: He isn't strictly our witness.

The Court: You put him on the stand. He is in fact your witness—strictly or loosely—either way. 513

Mr. McNamara: This is a type of matter that requires cross examination I believe.

The Court: No, it isn't a matter that requires cross examination.

Mr. McNamara: We will try to examine without.

Q. Will you tell us the various types of work you think this man could do safely without injury to himself? A. Why, as I have said, I

514 think he could do forms of labor in which he was not in contact with machinery.

Q. Do you think that farm work? A. Some forms of farm work I think he could safely do.

Q. What forms? A. He could work in the garden.

Q. Do you think that is a type of work in which he could earn a living? A. That is questionable.

CROSS EXAMINATION by Mr. FitzGerald:

515 Q. Doctor, you examined Mr. Lumbra for the Veterans Bureau back in 1920? A. Yes, sir.

Q. I hand you herewith, Doctor, Defendant's A for Identification and ask you if you will please tell what report was made by you at that time of the man and what his trouble was at that time? A. (Reading.)

Claimant's name—Newton Lumbra, Private 103rd Machine Gun Battalion, July 13, 1917 to April 29, 1919.

Present address—Montgomery Center. Age—

516 28.

Color—White. Previous occupation—Lumberman.

Brief military history of Claimant's disability:—Never sick in army; Hospital once for sprained ankle in France.

Became sick after getting home.

Present Complaint—Rheumatism, throat trouble, husky voice.

Diagnosis:—Articular rheumatism; chronic;—Laryngitis—chronic.

Degree of vocational handicap—negligible. 517.

Q. Those words "never sick in army"—they are in quotation marks. Is that for any particular reason? A. That is what the man told me so I put it in quotation marks.

DR. ALBEE A. SKEELS, called as a witness by the plaintiff, being duly sworn, testified as follows:

518

Direct Examination by Mr. McNamara:

Q. Your full name is Dr. Albee A. Skeels? A. Albée A. Skeels.

Q. You are a resident of St. Albans? A. Yes.

Q. You are a physician? A. Yes.

Q. Will you just tell us what your medical qualifications are, Doctor? Your study and various things of that nature. A. I am of McGill, Montreal,—eight years. I have taken—done some work since, in Vienna. 519

Q. In what type of work did you take in Vienna? A. General medicine and nervous troubles.

Q. When was that you took that work, Doctor? A. Let's see—1925 I think.

Q. You were in the army, Doctor? A. Yes.

Q. With what army? A. With the British Army,—The Imperial Army.

Q. How long were you with the British Army? A. Between five and six years.

520 Q. As a Captain? A. Yes.

Q. Of the Medical Corps, of course? A. Yes.

Q. How many years active service did you see during the actual fighting war? A. Over three years.

Q. On what front? A. I was in France, I was with the Serbian Front I was with the Serbian Army for two years, attached to the British —but attached to them, and I was in Italy during the war, and after the war I was in Egypt.

Q. Also with the army? A. With the army
521 all the time.

Q. In your army experience, Doctor, did you come in contact with mental and shell shock cases? A. Yes.

Q. Did you make some study of them? A. Yes.

Q. You have become acquainted with Mr. Lumbra's case in the last few months? A. Yes.

Q. Just before the other trial, was it? A. Yes.

522 Q. Will you tell us just how you happened to become acquainted with this case and interested in the matter? A. He come over to my office and naturally began to speak about his case, and I immediately thought of a case in a friend of mine exactly similar to his, and cases I had already seen. Now it is a question in my mind then whether it is a case—you talk about shock—that is a very, very loose term,—you see, shock means a lot;—if I tell a man he's had a shock, in most people it means apoplexy or he had a nervous shock; it may mean simply nervousness,

neurosthenit. To my thinking it is a question of drawing a line between a functional trouble, that is a trouble due to nervousness what we say "hysteria" or an actual organic trouble. Now as I grow older, I very much doubt a good many cases of so-called functional trouble they're not really organic trouble. For instance shell shock in many cases is called a sort of functional disease, a disease of the nerves. You know what I mean a woman is nervous at times, it is a different thing; nervous is a very, very loose term and so is shock. Now in many cases of shell shock there's some organic basis to it; there will be blood in the spinal fluid.— 523 524

Mr. FitzGerald: I submit it is not responsive.

The Court: It doesn't matter if it isn't —it's all admissible, isn't it?

Mr. FitzGerald: May I have an exception?

The Court: If it doesn't relate to the case, I will sustain your objection, but I won't sustain it because it is not responsive to the question. 525

Mr. FitzGerald: I don't think the fact the Doctor has a friend with the same type of trouble—I don't think it is admissible, —the type of testimony that has been given.

The Court: It doesn't make any difference whether the cases he has seen are all friends or strangers. He can refer to his patient as a friend, or refer to him as

526 a stranger,—it doesn't make any difference; it shows his experience.

Mr. FitzGerald: He doesn't say he has examined Mr. Lumbra at all.

The Court: He says he came to his office.

Mr. McNamara: May we show he did go into Mr. Lumbra's case and learned the history?

Witness: He did.

The Court: Go on.

527 Witness: Now, the question,—of course, I don't want to act as his attorney, your Honor.

The Court: There isn't any danger of that, Doctor. Go on and tell the jury.

A. (continued) The question in my mind is whether it is a functional thing or not. So, as I say—I have been rather skeptical about people unless they're absolutely "malingerers",—that is a term they use in the army for people trying to make out they're disabled or have some trouble 528 when they haven't; in other words—"skrinshankers"—which isn't an uncommon ailment in the army and especially after the army. Now, as I look on the case, he has apparently nervous seizures. Now, the question of their being petit mal—I have never seen anyone, and I don't know that anybody else has,—but it's an indefinite thing,—they lose consciousness for a very short time. For instance—they're eating and might drop their fork,—and if talking—they might stop the flow of their conversation and then go on

with it; that is one type. Now, I have listened 529
to the evidence of two practitioners who are experienced men—Dr. Davidson and Dr. Johnson—he saw him in the actual convulsion. Now, leaving aside the petit mal, he certainly had actual convulsions because his tongue was bitten and he was unconscious afterwards. Now, you cannot imitate that, as is apparently done, but you wouldn't deceive a doctor. You don't bite your tongue and don't void urine involuntarily, as he told me he did,—and two doctors, Dr. Davidson and Dr. Johnson who saw him have a convulsion, 530
and good practitioners saw him. It isn't a question of that man malingering or having hysteria, —a functional attack, as sometimes they have, but he absolutely had an epileptiform convulsion to my thinking, and I would swear it on a stack of bibles on that evidence, so the whole thing to my thinking is—what is the cause of it? He never had convulsions of any kind in childhood, —I am not going into the cause of convulsions in childhood—but as applies to his case; straight epilepsy is a disease that develops before puberty 531
and very rarely after twenty. Now, this boy had convulsions I say—he was twenty-five to thirty; —now, the cause of those in a great number of cases is some local lesion in the brain. Now, in looking over his case—naturally a man in the army,—a man who is trying to get his rights,— I was thinking what could be the cause of that. He told me he was thrown forty feet, and as I understand he has evidence to prove that; now, you take a high explosive shell—what they call

532 "big stuff" six, eight, nine inch stuff, going at
the speed I wouldn't want to estimate the speed
but you have all had experience, most people
have, with dynamite, and when you think of
high explosive it is in the class with dynamite, only
more powerful, going with such speed, you
can imagine what a terrible shock it is. He was
thrown forty feet. Now, the brain is not a rigid
organ at all and you don't necessarily have to
have a fracture of the skull to have an injury
that will cause convulsions afterwards. You
533 don't necessarily have even a spicula of bone
tissue in the inner part of the bony covering of
the brain to cause a convulsion. You might get
a pouring out of blood in greater or less degree,
and one of the peculiar things about it is this,
that you don't necessarily have a true epileptic
convulsion or an epileptiform convulsion until a
period of years. For instance, you may get a
thickening of the tissues and fibrous tissue form-
ing. You know how a thickening what we call
in the country "proud flesh" how you get a
534 large scar eventually. You might get this scar
tissue and as time went on, this tissue might con-
tract and cause an irritation to the brain and
cause convulsion.

Q. And could the convulsion, Doctor, develop say two or three or four years perhaps, or even longer, after the original injury to the brain cell?

A. Yes; absolutely.

Q. And is it consistent with that Doctor, that before the real convulsions develop, that this man could have nervous seizures of the type you have

heard testified about here today, that the perspiration stood out on him, he becomes tense and things go black before him, is that consistent with the growth of this type of thing? A. Absolutely. I have a great deal of skepticism about these purely functional cases; in the most of these cases I think there's some physical or organic basis to it. 535

Q. Doctor, can a man carry on consistently in employment when he is suffering from these convulsions such as you have heard described and know are the history in this case? A. No. 536

Q. Has he been able to any of the time consistently since he received that injury, in your judgment? A. I don't know to be perfectly frank, I don't know when these smaller seizures commenced.

Q. Assuming they commenced while still in the army, before he left the army at all, and continued all the time until they went into the convulsion type? A. I would say it would be very difficult for the man to carry on his regular vocation that had spells like that: We all know, when we are dizzy we become frightened, when we take dizzy or faint; that is my opinion. 537

CROSS EXAMINATION by Mr. FitzGerald:

Q. When did you first examine Mr. Lumbra? A. I couldn't tell you the day.

Q. Well the month? A. Why it was sometime before he came to Court here.

Q. You mean at this trial—in between the two trials? A. No, the previous trial.

538 Q. It was sometime right about that time. When he called at your office at that time, did he call for the purpose of having you examine him? A. No, he called on another errand, and then he spoke to me about his case and wanted my opinion, and to look him over.

Q. Did you do any more than just take the history that day? A. I took the history, yes. There is nothing in his history that would show —

Q. You didn't make any examination at that
539 time? A. Perhaps his reflexes, or something.

Q. You have no record of such examination, Doctor? A. No.

Q. Now, this history of involuntary voiding of urine, from whom did you obtain that? A. From him.

Q. You didn't mean to say that Dr. Davidson or Dr. Johnson testified that way? A. No, I don't know whether that came in the testimony.

Q. That isn't your recollection of their testi-
540 mony? A. No, I don't know except he bit his tongue.

Q. Doctor, you say there is no true epilepsy, —no true convulsion,—unless it began in puberty? A. I said very rarely idiopathic—straight epilepsy—rarely began after twenty; very rarely, and mostly before puberty.

Q. How about traumatic epilepsy? A. Ah! That can come any time.

Q. What is the probable cause for that, Doctor? A. Well, now, are you meaning this specific case or in general?

Q. No, we are speaking of the cause? A. Why my dear man, they're multiple; they're multiple. 541

Q. What is the primary cause for idiopathic epilepsy? A. I don't know and nobody else.

Q. What class of epilepsy is generally brought on by an injury? A. You can get straight epileptiform convulsions with loss of consciousness, or you can get "Jacksonian" where you don't get loss of consciousness, or you get it late in the seizure.

Q. Doctor, those injuries you referred to, you mean head injuries didn't you, Doctor? A. Yes, 542
but they might be an injury—a man may receive a head injury at the same time he gets another; a man may get a fractured skull and get a broken leg; the two things come together sometimes.

Q. The evidence in this case which you said you have been listening to is the man received an injury to his ankle? A. Absolutely.

Q. There was no evidence of or testimony of a head injury at all? A. That might not show. He might not know it. He was unconscious and had concussion, which has been shown in the evi- 543
dence, and unconscious.

Q. Would an injury to the ankle cause epilepsy? A. No, not unless there was some underlying cause.

Q. May epileptiform seizures be caused by the excessive use of alcohol? A. Theoretically; I never saw but one case.

Q. That is possible though, isn't it? A. Oh, in for instance where you get some irritation of the brain from excessive use of alcohol, you could get it, but not a very common cause.

544 Q. Isn't that accepted as one of the causes, Doctor? A. From a relative standpoint, no, I should say. It is easy enough to say such a thing could be a cause but the relative frequency of it makes a big difference.

Q. What is the most frequent cause? A. It develops in childhood.

Q. Isn't traumatic epilepsy apt to develop much after childhood? A. Oh, for instance, a child could be born with severe labor instruments used you would get an extravasation of
545 blood in the brain and develop epilepsy later on; or as you know, a child might eat something you are probably all family men may eat something and get convulsions; that is not true epilepsy. Where you get true epilepsy developing, it is usually in childhood and before puberty.

Q. Doctor, you testified that traumatic epilepsy could come on at any time? A. I didn't say at any time.

Q. It might be five years or so afterward? A. I wouldn't want to limit myself.

546 Q. Five years after what? A. After the initial injury.

Q. That means that if an adult were to receive an injury today, sometime within the next five years he might be subject to epilepsy? A. Not necessarily.

Q. I said he might be? A. If a man received an injury today—an injury to his head—now you mean to the head?

Q. Yes, to the head. A. An injury to the head that caused some extravasation of blood or

inflammation of the membranes, it could come on 547.
several years afterwards.

Q. Now, Doctor, from the time he received this injury until the seizures developed, is he injuring himself, or endangering his health in any way by working, Doctor? A. May I ask that be repeated?

Q. Repeated. A. Well, now that is a supposition contrary to fact because he had certain seizures up to the time of his grand mal his severe seizures, fits.

Q. You were asked a question. By that I 548.
meant the man may, hypothetically, receive the injuries today and may develop epilepsy five years from now?

Mr. McNamara: He isn't asking it on a fair basis. He is asking it as though it may be the indefinite man and applying it to the present case. The Doctor has answered on the present case.

Q. I am speaking of this hypothetical case, 549
where the man received an injury today and develops epilepsy four or five years from now. In between times is he injuring his health or endangering himself any by working, Doctor? A. Granted that he has no nervous seizure of any type in between the time that he was injured and he had these convulsions, he would not; no, sir.

Q. From the history you obtained of Mr. Lumbra, do you believe he had true epilepsy? A. At that time you mean did he? You mean did he have petit mal? Do you mean that?

550 Q. No, I am asking do you think Mr. Lumbra has true epilepsy? A. He might have that.

Q. What do you think? A. I think he had. I think he had petit mal but I wouldn't want to swear to it because I have never seen him in an attack. He might have it and not know it himself, but I think that he had it from the history.

Q. At the last trial you testified "to my way of thinking he did not suffer from idiopathic epilepsy but has epileptiform convulsions". What do you mean by that? A. Absolutely; that is
551 perfectly logical. You cannot separate epileptiform convulsions in an arbitrary way. For instance, for some unknown cause a man develops epilepsy, he might have these nervous seizures from an injury,—slight nervous seizures—and then go on to his grand convulsions.

Q. Well, Doctor, what do you think Mr. Lumbra has? A. I think he has had an injury to his brain. He had an extravasation of the blood in his brain or in his meninges, more or less, which has caused this trouble. He has developed it late
552 in life, after puberty; and that is my true conviction.

Q. You believe he has grand mal epilepsy caused by the head injury? A. From the history, I do.

Q. Isn't it true, Doctor, that grand mal epilepsy caused by head injury, does not develop from petit mal to grand mal? A. I don't know that he had petit mal, but he had certain nervous seizures. As I told you at first, I wouldn't want to say the man had nervous seizures, and the old-

er I grow and the more I see, the more skeptical 553
I am of these nervous seizures not being based on an organic trouble.

Q. Would you exclude petit mal, Doctor? A. I have never seen him. I don't want to swear to a thing I have never seen. I know he had some nervous seizure and to my firm belief, it was founded on some organic, physical trouble.

Q. If it was founded on an organic, physical trouble, what would that trouble be classified as, Doctor? A. Well, I shouldn't call it shell shock from the first. I should say it was some cerebral 554
extravasation of blood.

Q. Would you call the result epilepsy? A. To all intents and purposes, yes.

Q. Would that be petit mal epilepsy from the time he began the history of this nervous condition, was he suffering from petit mal? A. Frankly I don't say he suffered from petit mal. I didn't see him, nor has anybody else seen him that I know of, and I wouldn't want to swear to what I don't know from actual knowledge. He might not know he had petit mal. 555

Q. You have accepted his history as being correct? A. Yes, substantiated by the evidence of two well known practicing physicians in the town I live in.

Q. And the testimony you heard from the practicing physicians, Doctor, was what they classified as grand mal epilepsy when he had the convulsive seizure? A. Well, I don't believe in hard and fast rules. Perhaps you know a woman in labor may have Brights Disease and have ec-

556 lampsia—she has convulsions;—to all intents and purposes they are just as serious and more serious—absolutely a picture of epilepsy. To my thinking epilepsy is a symptom of some trouble, epileptiform convulsions are simply a symptom.

Q. Your final analysis in this case, Doctor, is that he has seizures of some kind and you don't know what causes them, is that right? A. Not a bit of it. I firmly believe he has epileptiform convulsions, which is practically epilepsy,—which *is* epilepsy, and they were caused by an injury
557 he had from the high explosive—thrown forty feet.

Q. You are accepting that primarily on the testimony of Dr. Davidson and Dr. Johnson, is that correct? A. No, the other testimony,—testimony of his injury during the war.

Q. I mean so far as the convulsive seizure is concerned. A. Yes, and his own history.

Q. Prior to the time he was first observed in a convulsive seizure by Dr. Davidson in 1929, and other testimony in here,—the first was in 1923,
558 —prior to that, Doctor, what was his condition? A. I don't know because I—

Q. Would you say that was petit mal in between times, Doctor? A. I wouldn't want to be specific because I don't know, but he had some nervous seizure.

Q. But you cannot classify that as petit mal? A. I don't know enough about it. A man cannot tell about his own symptoms. He might lose consciousness—he may not know. I wouldn't want to say that.

Q. But isn't it true, Doctor, that after a per- 559
son reaches maturity and they have traumatic epilepsy, that it doesn't go from petit-mal to grand mal? A. Well, I am not—I don't want to be dogmatic, and if you remember, I have been very careful to say that I didn't know he had petit mal. He had some type of nervous seizure which I thought was based on some organic trouble.

Q. If he had this type of nervous seizure which you wouldn't classify as petit mal epilepsy, —is that right? A. I don't say,—I am keeping 560
absolutely neutral; I wouldn't say one way or the other.

Q. If he had this nervous seizure—(interrupted) A. It may be petit mal.

Q. (continued) from 1918, these passing spells of dizziness, up until he had his first convulsive seizure in '23, which is the earliest date I believe, —is there any reason why he couldn't work in between times? A. What was his labor?

Q. Is there any occupation he could do, Doc- 561
tor,—Filling Station Operator, Watchman, Cashier, or anything? A. Well, that depends on the frequency that he had these spells; that depends.

Q. Doctor, you say there's a nervous spell of some kind. Isn't it a fact, Doctor, if you keep a nervous person occupied, it is beneficial rather than detrimental? A. You are crossing the line; —there's a line between what we call functional nervousness,—but if you have some organic trouble you are distinctly worse off. Nervousness is a very loose term,—the same as shock is.

562 By the Court:

Q. It is a broad term? A. It is a broad term.

By Mr. FitzGerald:

Q. You testified to "organic trouble". You mean a brain condition of some kind? A. Yes, or of the nervous system.

Q. You say if there's scar tissue there? A. Yes.

Q. Would the X-ray show that? A. No.

Q. There would be no means of determining

563 that at all? A. No.

Mr. McNamara: The plaintiff rests

(3:15 P. M.)

(Recess.)

DEFENSE.

CHARLES H. DOMINA, called as a witness by the defendant, being duly sworn, testified as

564 follows:

Direct Examination by Mr. FitzGerald:

Q. Mr. Domina, please state your name, address and occupation. A. Charles H. Domina; my address is Montgomery, and I am now in the mill business—lumber business.

Q. How long have you resided at Montgomery? A. Practically all my life,—born and brought up there; lived there all but about eight years of my life.

Q. Do you know Newton Lumbra? A. Yes. 565

Q. You have known him how long? A. Oh, since he was a young kid.

Q. Did you know him before the war? A. Yes.

Q. Did you see him when he returned from the war? A. Yes, shortly after, I think.

Q. Did he work regularly before the war? A. Not as I remember.

Q. And after his return from the war, did he reside at Montgomery? A. Yes.

Q. Did he work regularly there? A. No, he 566
did not.

Q. Did he work any more irregularly after he came back than before the war?

Mr. McNamara: I object.

The Court: Admitted.

Mr. McNamara: May I state my objection? We say he is not competent to make a comparison. He can testify to the facts but he hasn't any right to testify to his judgment.

The Court: Tell how much he worked 567
before and how much afterward.

Mr. McNamara: This question asked for a comparison between the two.

The Court: Objection sustained.

Q. Do you know whether or not Mr. Lumbra was a drinking man and how do you know?

Mr. McNamara: I object to that.

The Court: We haven't had any doctors testify that this man's condition is due to the use of alcohol.

568 Mr. FitzGerald: They all testified it might be.

The Court: But none said there is any probability to believe it is true in this case.

Mr. FitzGerald: They all said there's a number of causes.

The Court: I think to be perfectly fair in this case, that the Government should first show that his condition is due to the use of alcohol, or there's some reasonable probability of it having affected it. In-
569 stead of turning the trial into a trial of the man's character and habits, we should try his case, it seems to me.

Mr. FitzGerald: We are offering this testimony, your Honor, for three purposes: —credibility,—to show loss of time from work, and to show the possible cause of his condition.

The Court: But you haven't put in any evidence that tends in the least to show his epileptic fits are due to his use of alcohol.
570 Now, it is true, of course, that you asked the Doctor if such a thing is possible. Why, yes,—it is possible. It is possible you will fall down tonight when you go to your hotel and kill yourself, but not probable. Now, if you really want to try the case, you should try to show there's some reasonable ground that the use of alcohol caused his condition,—is the cause of his fits. Now, there isn't any evidence to that effect here. The evidence on the other hand

is that this is a functional disturbance; 571
the evidence is he injured his brain at the time of the shell explosion, and when he became unconscious. If you have any evidence or are going to produce any to tend to show his fits are caused by the use of intoxicating liquor, you should put that in first.

Mr. FitzGerald: If the Court please, all the medical testimony here has been that epilepsy may be caused by many things. Dr. Skeels is the only one who stated it 572
was his firm conviction it was caused by his injury in France, and we hope to show there was no injury received in France.

The Court: Why not start the trial in that way?

Mr. FitzGerald: This particular witness wants to get home.

The Court: It would be better for his wants to go unsatisfied rather than to do a wrong to this plaintiff.

Mr. FitzGerald: We wouldn't do any 573
wrong to the plaintiff intentionally.

The Court: It wouldn't help him any whether done unintentionally. I have a very clear recollection of the trial.

Mr. FitzGerald: May I have an exception to your Honor's ruling?

The Court: Yes. I am just postponing this. Put in your other evidence first. The Court isn't willing to turn this into a trial of the soldier's habits in life. The ques-

574 tion is:—Is he incapacitated and entitled to his insurance?—not whether he becomes intoxicated,—unless there's some evidence here that the use of intoxicating liquor is the cause of his disability.

Mr. FitzGerald: Your Honor, there's evidence it may be the cause.

The Court: That is way away from the real issue. It may be a great many causes of his condition; a great many possible causes. Now, I won't exclude your evi-
575 dence. I just say you postpone this evidence and see what your evidence is going to be as to whether his condition is caused by the use of intoxicating liquor. I won't exclude it now, but I just ask you to postpone that part of your case, notwithstanding your witness' necessity to get home. That is unimportant.

Mr. FitzGerald: If the Court please, it will be impossible to attribute alcohol as
576 being the cause without showing the use of it.

The Court: No, you have this man's condition here—all his symptoms,—you have his career,—now is there any professional man—that would be an expert question,—who will say his condition may have been caused by the use of intoxicating liquor? Another thing about that he did not have this disturbance before this explosion in France, but he did right after that, in mild form, and they have been in-

creasing and more severe. I will ask you 577
to postpone this part of your case until after we see what the other doctors are going to say about this.

Mr. FitzGerald: I don't think it would be fair to ask doctors to say this was the cause; the possible or probable causes are too numerous.

The Court: I think it would be very fair, and I think it would be very unfair without asking a doctor first that question. 578

Mr. FitzGerald: If alcohol is the cause of this man's condition?

The Court: Yes.

Mr. FitzGerald: Your Honor, no doctor could say it. The doctors who have already been on the stand have said it is a possibility. Whether it is a probability or not is for the jury to decide.

The Court: I shall not submit it to them to decide unless there's some evidence to support it. That is fundamental for hundreds of years. 579

Mr. FitzGerald: I am trying to put in that evidence to support that hypothesis —that is the cause.

The Court: You just said you don't expect any doctor to testify to that, and it certainly is an expert question. If a doctor cannot give an opinion on it, it is the plain duty of the Court not to let the jury decide the question, because it would be on

580 a mere guess. No question can be submitted to the jury to decide that there isn't any evidence to support.

Mr. FitzGerald: I submit there's evidence in there that there's a possibility that is the cause.

The Court: It should not be submitted to the jury if it is a possibility. It has to be a probability.

Mr. FitzGerald: It is being offered, Your Honor, to show loss of work.

581 The Court: You say the use of intoxicating liquor has a bearing on a person's credibility, and I will pause here to have you bring me some law on that question.

Mr. FitzGerald: I wish to apologize. I was mistaken. I meant his conviction would be admissible.

The Court: On that question you are right. His conviction would be but not as bearing on the cause of his disease.

582 Mr. FitzGerald: It may be also offered to show probable or possible loss of time from work. This man has stated his broken employment; worked and was off; may the jury not consider the fact that that might have been caused by things other than epilepsy?

The Court: Yes, of course, it may. A man may go hunting and lose some time, or go fishing and lose some time, or be sick and lose some time, or go to the circus and lose some time. If you can show he

was drunk and lost time, not because of his health, I will admit it for that purpose, —because he was drunk,—not because of ill-health; that is admissible. 583

Mr. FitzGerald: All right, your Honor.

The Court: That must be shown; of course, at the time he lost the time. A man is entitled to his insurance even if he does take a drink or become intoxicated. The Government made a contract with this plaintiff by which it agreed to insure him and didn't put into that if he got intoxicated it would become void. We should be very careful here to try this man's case on his policy,—his insurance that he bought from the Government, and not on his habits. No matter what kind of a man he is, he is entitled to his insurance, if he's drunk all the time, unless his drunkenness is the reason for his ill-health. Have I made that clear to you gentlemen? A man steps up to the Government and buys his insurance policy of them, or the Metropolitan Insurance Co. and buys a policy of them, and sues them—why it isn't a defense that they can interpose against paying the insurance because the man got drunk on one or more, or on all occasions unless his drunkenness has caused his disability. Now, in this case, if this plaintiff, this soldier boy, was disabled while he was in the war, he is entitled to his insurance, if he's been drunk all the time ever since. 584 585

586 his discharge, unless the fact is that he was not disabled by reason of his service in the war but has become disabled by reason of his drunkenness since the war. Have I made that clear to you? Now, as I said yesterday, we should try this man's case and try the Government's case and decide it and decide it right. It is the duty of the Court not to submit any question to the jury to decide unless there's some evidence to support those questions. Whether there's any evidence in the case to support a given question is a question of law for me to decide, but if there's evidence to support a question, then it is a question for you to decide.

587

Mr. FitzGerald: I submit there's some evidence in there—all of the doctors have given that as a possibility.

The Court: We will stop here and let you consult the books and show me some law to that effect. It hasn't been written in the books yet so far as I have had occasion to look at them, but on the contrary, the rule is just the reverse. Unless there's some evidence in the case more than a possibility—unless there's some evidence tending to show probability the fact is so, then it is not a question for the jury to decide. Now, that has been the law for a good many hundreds of years. Now, on your question that his drunkenness is the reason

588

he did not work more, we leave that open for you but it must be connected;—he did not work on certain such occasions because drunk,—but the evidence must be strong and convincing enough to show such continual intoxication—to show the inference is he could not work because intoxicated. 589

Q. State whether or not, Mr. Domina, you have had occasion to arrest Mr. Lumbra for drunkenness and the result of that arrest?

Mr. Sylvester: We object to that. That doesn't show a conviction. A conviction might not follow. 590

The Court: It would not be necessary to show a conviction to show he did not work because he could not.

Mr. Sylvester: He should show first he was working at this specific time.

The Court: To make it reasonably probable,—you cannot expect to name the exact, date,—but to make it reasonably probable. He can tell about his being drunk. Come right to it. How drunk he was and how long. 591

Q. Repeated. Did you ever see Mr. Lumbra drunk? A. No, sir.

Q. Did you ever arrest him for that charge?

The Court: Wait a moment.

Mr. Sylvester: I object to that.

The Court: Excluded. Prove that by the records of the Court. The fact he was arrested is not admissible either; he says he never see him drunk.

592 Q. Did you ever see him drunk on any occasion?

Mr. Sylvester: I object to that.

The Court: You asked him that and got "no" for an answer.

Q. Did you? A. You asked me if I ever saw the man drunk, did you not?

Q. Yes? A. And I said "no".

Mr. FitzGerald: That is all then.

Mr. Sylvester: No cross examination.

593

W. J. WRIGHT, called as a witness by the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. FitzGerald:

Q. State your name, address and occupation. A. W. J. Wright, general merchant and postmaster, Montgomery Center.

Q. Do you know Newton Lumbra? A. I do.

594 Q. How long have you known him? A. Always.

Q. Do you know whether he worked regularly before the war? A. He did not.

Q. You saw him before he went to the army? A. I did.

Q. Did you see him on his return? A. I did.

Q. State whether or not there was any difference in his appearance from the time he left until he returned?

Mr. MeNamara: I object to that.

The Court: Admitted.

595 Mr. McNamara: That is calling for a conclusion.

The Court: That is all right.

Mr. McNamara: Exception.

Q. Repeated. A. I didn't observe any, no; there was not.

Q. State whether or not there was any difference in his movements, as to whether he was faster or slower when he returned?

Mr. McNamara: I object.

The Court: Admitted.

596 Mr. McNamara: Exception.

A. None that I observed.

Q. Did he work any more regularly after the war than he did before the war? A. Irregularly.

Mr. McNamara: Objected to.

The Court: He ought to tell what he knows about his work before and what he knows about his working after, and then the jury can say whether more or less.

597 Q. Did you know about his work before the war from observation? A. I do.

Q. Do you also know about his work after the war from observation? A. I do.

Q. Was there any change?

The Court: Excluded. Tell how much he knows about it before, and tell what he knows about his working after.

Mr. FitzGerald: That is what I want him to say, your Honor.

The Court: You asked him just to the

598 contrary and just what the Court excluded.

Q. State what you know about his working before the war and what you saw after.

The Court: Tell how much you saw him work before and how much after.

A. Well, I saw him work some but not regularly before the war, and I didn't see him work regularly after the war, although he did work some after the war.

Mr. FitzGerald: That is all.

Mr. McNamara: No cross examination.

599

GEORGE H. CHAPEL, called as a witness by the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. FitzGerald:

Q. State your name, address and occupation?

600 A. George H. Chapel, Montgomery Center, Vermont; occupation, clerk in store.

Q. Do you know Newton Lumbra? A. Yes, sir.

Q. How long have you resided in Montgomery Center? A. Since 1916.

Q. Did you know Mr. Lumbra before the war? A. Yes.

Q. Did you know him after the war? A. Yes.

Q. Did you see him shortly before he went into service? A. Yes.

Q. Did you see him shortly after his return? A. Very soon after his return.

G. H. Chapel, for Deft., Cross.

Q. Was there any difference in his appearance from the time he went away until he returned? A. I couldn't see that there was. 601

Q. Do you know anything about his industrial activity, whether he worked or not?

The Court: He can tell what he saw.

Q. Did you ever see him work at any time? A. I never did.

CROSS EXAMINATION by Mr. McNamara:

Q. You were working yourself, weren't you? A. I worked in the store. 602

Q. And pretty regularly employed? A. Yes, sir.

Q. So you were not out around looking to see where the other people were working? A. No.

Q. Whether they were working or not. Probably you didn't see anyone in town working, did you? A. Well, I could usually tell what—

Q. I asked what you saw? A. Well, I see them come by to the mill; go by the store to work. I have never seen anybody working unless I have been to the mill. 603

Q. You never have been out around farms to look and see if people on the farms were working? A. Only when I had occasion.

The Court: Isn't that enough?

604 DR. WALDO J. UPTON, called as a witness by the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. FitzGerald:

Q. Please tell your name, address and occupation, Doctor. A. Waldo J. Upton, Burlington, Vermont, occupation, physician.

Q. State your medical education and training, Doctor. A. Well, I graduated from the Univer-
605 sity of Vermont in '98; I was ten years at the State Hospital at Waterbury, and I have done post-graduate work at different times in New York, and since 1920 I have been Superintendent at the Lake View Sanatorium for nervous cases.

Q. Do you specialize in any branch of medical science? A. N. P. cases.

Q. What does that mean, Doctor? A. Neurology and Psychiatry, is what it means.

Q. In lay language nervous and mental diseases? A. Nervous and mental diseases.

606 Q. Have you had occasion to examine Newton Lumbra, Doctor? A. Yes.

Q. Is he the gentleman at the counsel table? A. Yes.

Q. When did you first examine him, Doctor? A. In 1924 as I recall.

Q. At that time did you take a history from the man? A. I did.

Q. Please state what history you obtained and the result of your examination. A. He stated that he had no serious illness or injury previous

to his military service; that he had no injury or illness during his military service; that he was discharged in good physical condition; began working shortly after but after a few months became nervous,—couldn't endure noise and excitement, became weak and trembled under such conditions, and as I recall at that time I diagnosed it mild neurasthenia. 607

Q. What is mild neurasthenia, Doctor? A. Mild neurasthenia is a functional nervous condition wherein the patients are not able to—well; it is characterized by weakness, irritability and marked fatigability; they tire quickly, under stress. There are many symptoms that may occur; insomnia, indigestion, and possible attacks of trembling; weakness. 608

Q. Could a person with mild neurasthenia work with reasonable regularity at any occupation? A. Yes.

Q. Would such work injure his health or endanger him in any way, Doctor? A. No.

Q. Did you examine him at any other time? A. I examined him several times subsequently. 609

Q. Do you have records of those examinations, Doctor? A. Yes, I have.

Q. If you cannot testify from memory, you may consult them to refresh your memory and tell the history obtained, the examination and your diagnosis. A. The first examination was April 3, 1924; the diagnosis was Psychoneurosis, qualified—mild neurasthenia. The second was Jan. 14, 1925; I had the same history given and the diagnosis was the same—neurasthenia. I say

610 the same history except he stated that in 1924 he became so nervous that he quit for three months; then began working and had continued up to the time of the examination.

Q. When was that examination? A. Jan. 14, 1925. The next examination was Jan. 29, 1926. At that time we had the previous history repeated, with this addition: "worked in the railroad car shop past three years but had to lay off two or three months each year." The next examination was April 19, '28, at which time the diagnosis was severe neurasthenia and severe hysteria. The history at that time showed that between 1926 and '7 he developed attacks of unconsciousness which were considered to be hysterical from his description.

611

Q. And the date that he began developing them —from whom did you obtain that, Doctor? A. From Mr. Lumbra. Jan. 17, 1929, was the next examination. At that time he stated that following hard work or excitement or headache, he developed unconscious periods lasting twenty minutes. He knew when they were coming on, and following the attacks was obscure for forty-eight hours afterwards. I might say that "obscure" in this sense means his head did not feel quite clear for the following forty-eight hours. The diagnosis at that time was the same, as previously, severe hysteria and severe neurasthenia. July 8, 1930, he was again examined. The diagnosis at that time was a pronounced psychoneurosis, indicating that his condition was more severe than previously; a mixed neurasthenia and hysteria,

612

with a notation:—"change in character and the spasms suggest that he is developing grand mal epilepsy; observation is necessary to determine." 613

Q. When was that Doctor? A. That was July 8, 1930.

Q. At each of these several examinations did you obtain a history from Mr. Lumbra? A. Yes.

Q. Did you inquire into his war service as to whether or not he was wounded or received an injury? A. I did.

Q. And what was his statement on each of these occasions? A. He stated that he had no illness or injury in service. 614

Q. Now, Doctor, when you first examined him in 1924, it was mild neurasthenia? That was your diagnosis? A. Yes.

Q. And that subsequent examinations indicated that his trouble was growing progressively worse, is that correct? A. It was.

Q. Up until 1926 when he told you he was having these convulsive seizures, was there any reason why he couldn't have worked with reasonable regularity at some occupation, Doctor? 615
A. I think he could.

Mr. FitzGerald: That is all.

CROSS EXAMINATION by Mr. McNamara:

Q. He couldn't work full time, could he? A. At light occupation I think he probably could.

Q. Light occupation as a laborer, or do you mean if he was qualified to do some type of light work sitting at a desk? A. I mean some light occupation that did not require some severe physical or mental exertion.

616 Q. That type of occupation would require some education, would it not? A. Not necessarily.

Q. Isn't that generally so, light work in a sitting position? A. It has been spoken of such as attending a gasolene station; that does not require any great education.

Q. Now, in 1924, Doctor, when you examined him at that time, did you consider that his trouble was a functional one? A. Yes.

617 Q. And did you know just what functional disturbance it was? A. Well, the function of the nerves.

Q. And whether spinal or brain causation could you tell at that time? A. There were no symptoms that indicated there was a spinal injury or a brain injury.

Q. Could there have been a brain injury without your being able to find it? A. There could have been.

618 Q. And the fact this has developed as your examination shows it has, until now you find in 1930, which I think was the last examination you quoted from there, that grand mal epilepsy was developing, the fact there was this development all the way through the period of your examinations, would you say from that that there was a probable brain functional injury which caused this in the beginning? A. Grand mal epilepsy is not considered a functional disease.

Q. Well, hysterical convulsions are a result of a functional disease, aren't they? A. They're considered functional, yes.

Q. That might be from a brain lesion of some sort, or any type of brain injury? A. The hysterical you refer to? 619

Q. Yes. A. Yes.

Q. That can be a progressive thing, can it not, too, Doctor? A. Yes.

Q. Could a person suffer a slight concussion with a slight fissure caused in the brain, even so small the X-ray would not show it, that might not show any serious disability for sometime and might develop into this sort of result you have found in this case? A. Please say whether you 620 mean epilepsy or hysteria.

Q. There seems to be some question which it is, doesn't there, Doctor, in this case? A. No, in my opinion he had neuresthenia progressive, which became worse, developed a hysterical condition in conjunction with it, and later developed epilepsy.

Q. Whether it is epilepsy or hysteria, the convulsion I mean, couldn't it reasonably be the result just as I have pictured, of a concussion which may have caused a slight fissure or lesion 621 to the brain cortex or some part of the brain, that did not develop into the hysterial type for some years? Isn't that a probable result of concussion? A. Well, the hysterical condition is functional and might or might not develop from a brain injury.

Q. What function is it? What organic function is it that is the result of? A. You are asking a question no one has ever decided yet.

Q. Is it brain or nerve? A. It is the general nervous system; the brain is included.

622 Q. Isn't it consistent with concussion caused by being thrown by the explosion that might cause the concussion at that time and develop slowly up to this point we now see it? A. It might.

Q. It is all very probable, isn't it? A. I wouldn't say it is very probable; it isn't improbable.

Q. A man might undergo that type of injury and not know he was injured, might he not, Doctor? A. Yes.

623 Q. So that in making his report to you when asked the history of this case, if he had an injury in the army, he would be perfectly honest in saying he didn't have an injury and still have had a brain concussion at that time, couldn't he? A. Not in the terms he used with me when I asked him directly if he had an injury—he said he did not.

Q. Well, he could have had the brain injury and still not know it? A. I shouldn't expect he would have an injury sufficiently severe to injure
624 his brain without having some knowledge of it.

Q. You know, Doctor, there were a great many men thrown to the ground from the concussion of high explosive shells during the war, who got up and went on apparently all right for sometime after, before there was any noticeable change in their condition? A. Yes.

Q. Then something come on which has been called under the general heading of shell shock since then, isn't that so? A. Yes.

Q. Those men at the time they were thrown to

the ground with that concussion, for sometime thereafter until the mental breakdown, they didn't know they had an injury, did they? A. Not unless they were told it. 625

Q. Then a man in the case of Lumbra here, that underwent such a throwing and concussion as has been indicated by the testimony here, could be perfectly honest in saying he did not receive an injury at that time, couldn't he? That is, he would have no way of knowing he received that until it developed and showed later,—isn't that probably correct? A. That is possible. 626

Q. From the time this was in its mildest stage, so far as the history of it was shown to you, it brought about loss of time at the type of work he was trying to do, didn't it, Doctor? A. He so stated.

Q. Is that the logical thing to expect? A. Yes; it might be.

RE-DIRECT EXAMINATION by Mr. Fitz-Gerald:

Q. These men who received severe injuries which have been termed as shell shock, they knew they got those injuries, didn't they? They knew they were knocked down? A. From what I have learned from examining claimants, some did and some did not, until they were told by their comrades. 627

Q. I mean if it resulted in some serious injury, Doctor, and you were to ask them the question if they received an injury, this would have been so pronounced as to have been in their mind, would it not? A. I should expect that it would.

628 DR. J. C. O'NEIL, called as a witness by the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. FitzGerald:

Q. Please state your name and address and occupation. A. James C. O'Neil, Waterbury, physician at the State Hospital.

Q. State your medical education and training, Doctor. A. Graduated from the University of Vermont, 1917; I have been at the State Hospi-
629 tal ever since.

Q. Specializing in? A. Mental and nervous diseases.

Q. Have you ever had occasion to examine Newton W. Lumbra? A. I did.

Q. State the time of that examination? A. August 22, 1927.

Q. Did you take a history from him at that time? A. I did.

Q. Please state the history you obtained, your examination and diagnosis, Doctor. A. He
630 stated he never had had any illness previous to the army service except the usual diseases of childhood. He said he had no illness while in the service and no injury except a fractured ankle and slight gassing for which he was not hospitalized. He gave a history of nervous attacks—said he felt nervous from the time practically he left the army and that for three years he had been getting Government compensation on a diagnosis of neurasthenia, and that sometime within the year previous to the time I saw him he began

to have some sort of fits; these came on rather 631
infrequently, and that for nine weeks previous to the time I examined him, he had not been working. I made a diagnosis of psychoneurosis, hysterical type, or hysteria, you can call it, of a severe degree I believe I called it at that time.

Q. And when did he tell you, Doctor, those convulsive seizures began? A. About a year previous to the time I saw him.

Q. That was when? A. August 22, 1927.

Q. May alcohol bring on such seizures, epileptiform seizures? A. Epileptiform seizures— 632
it may.

Q. At the time you saw Mr. Lumbra, Doctor, from his history, was there any reason why he couldn't work at some occupation with reasonable regularity at least up until the time he began having those seizures? A. You are asking my opinion?

Q. Yes. A. I don't know as that is worth much. His own statement—(interrupted)

The Court: The jury will tell us about 633
that.

A. (Continued) his own statement to me was he had worked practically all the time up to that time.

Q. That is, from the medical history, was there any reason why he couldn't work, in your opinion, with reasonable regularity at some occupation, without injuring his health, up until the time he began having those seizures? A. I don't think there was such a reason.

Q. You mean he could have worked? A. He could have worked.

634 Q. After he began having these seizures, Doctor, was there any occupation at all that he might do, might follow, without endangering his health? A. I think there was.

Mr. FitzGerald: That is all.

CROSS EXAMINATION by Mr. McNamara:

Q. Whether or not he could do that steadily enough to gain a livelihood, you don't know, do you, Doctor? A. If my idea of his condition is correct, and I have no reason to doubt it, whether
635 or not he could work would depend largely on the circumstances in which he worked.

Q. Well, assuming a man of his limited education, whose only training had been that of a common laborer, is it probable that type of man could go on and work with sufficient regularity and could get the work to do, with these seizures?

The Court: Isn't that a question for the jury?

Q. You had a history, Doctor, in this case of nervous trouble from the time he left service?
636 A. I think that is as he stated it.

Q. And that was progressive, increased in frequency and intensity? A. I don't know as to that; he didn't go into any great detail as to how it affected him the first time he noticed it, and my opinion is based largely on his condition as I saw him then.

Q. In your judgment had he been subject to some nervous disturbance for a number of years prior to the time you saw him? A. He gave me a history of such.

Q. You were basing it on the history? A. Practically entirely. I had never seen him before. 637

Q. You couldn't tell from an examination at that time without the history? A. No.

Mr. McNamara: That is all.

FRANK LAVALLA, called as a witness by the defendant, being duly sworn, testified as follows: 638

Direct Examination by Mr. FitzGerald:

Mr. FitzGerald: If the Court please, may the Doctors be excused?

The Court: Yes.

Q. Please state your name and address. A. Frank Lavalla, Montgomery Center, Vermont.

Q. How long have you resided in Montgomery Center? A. Forty years.

Q. Do you know Newton Lumbra? A. Yes, sir. 639

Q. Did you know him before the war? A. Yes, sir.

Q. Did you know him after the war? A. Yes, sir.

Q. Did you see him shortly after he returned from the army? A. Soon after.

Q. Was there any difference in his appearance before he went away? A. No, sir.

Mr. McNamara: I object.

Q. Was there any difference in his carriage

640 or his activity from the time he came back as compared to the time before he went away? A. No, sir.

Q. Do you know whether or not he worked regularly before the war?

Mr. Sylvester: I object to that.

The Court: He may tell what he saw of his work.

Q. Did you ever see Mr. Lumbra work before the war? A. No, sir.

Q. Did you ever see him work after the war?

641 A. No, sir.

Q. During the time of 1919 to 1921, did you have an opportunity to know him pretty well? A. Yes, sir.

Q. Did he ever complain to you of being sick? A. Yes, sir.

Q. Did he tell you the cause of his sickness or did you know the cause of his sickness? A. Well —(pause).

The Court: He is not a professional. He can tell the complaint that was made.

642 Q. Withdrawn.

Q. Did you ever see Mr. Lumbra drunk? A. Yes, sir.

Mr. Sylvester: We object to that.

The Court: On your promise that you would connect that with his loafing—

Mr. FitzGerald: I am going to with this witness.

Q. Where was he living at that time? A. With me.

Q. Did he have a position or job at that time? A. No.

Q. Was he able to work the next day? A. No. 643

Mr. FitzGerald: That is all.

CROSS EXAMINATION by Mr. McNamara:

Q. You said he didn't have any job at that time?

The Court: That is just what he said. Do you expect to improve that any?

Mr. McNamara: I would like to examine this witness, if I may. This is cross examination.

The Court: All right; go on. 644

Mr. McNamara: The attorney says he couldn't work because he was intoxicated. Now he says this man saw him drunk and at the time he saw him drunk, he didn't have a job. He hasn't come up to his job.

RE-DIRECT EXAMINATION by Mr. FitzGerald:

Q. Have you ever seen him drunk when he did have a job? A. No.

Q. Did he ever work when he lived with you? 645

The Court: That isn't admissible.

Mr. FitzGerald: As to whether or not he ever worked, isn't it possible to help refresh a witness' memory?

The Court: He doesn't need any refreshing his memory.

Mrs. A. Chapel, for Deft., Direct.

646 MRS. ADA CHAPEL, called as a witness by the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Fitzgerald:

Q. Please state your name, address and occupation? A. Mrs. George Chapel, Montgomery Center, Vermont, occupation housework.

Q. How long have you lived in Montgomery Center? A. All my life.

647 Q. Do you know Newton Lumbra? A. I did.

Q. Did you know him before the war? A. I did.

Q. And afterward? A. Yes.

Q. Did you see him shortly after his return? A. The day he landed; the day he came.

Q. Did you notice any change in his appearance when he returned as compared to his appearance before the war? A. No, I did not.

Q. Was he slower or more active or any different in his carriage or movements? A. I did

648 n't see any change.

Mr. McNamara: Objected to.

The Court: It is allowed.

Mr. McNamara: Exception.

Q. During 1919 and '21 did you have much opportunity to observe him? Did you have much chance to see him? A. Yes.

Q. How frequently did you see him? A. From 1919 to '21, every day; I see him every day.

Q. Did he ever make any complaints to you

of dizziness, weak spells or convulsive seizures? A. No, he never did.

Mr. McNamara: We object to that.

The Court: That isn't admissible; the fact he didn't make complaints to anybody isn't evidence of the fact.

Q. Do you know whether or not he worked at any place during 1919 or '21? A. I can't say I don't know.

Q. You don't know whether he worked or not? A. He worked but I cannot say where or saw him work.

Q. You do know he had a position?

The Court: Let her testify.

Q. Do you know whether or not he had a position during that time? A. From what year did you say?

Q. From 1919 to '21? A. Why, unless it would be at the Nelson Hall Co. at that time.

Q. Do you know whether or not he worked at the Nelson Hall Co.? A. Yes.

Q. Do you know when he was working at the Nelson Hall Co.? A. Why, at the time he married when he was living with my sister.

Q. Do you know how long he worked there? A. No, I cannot tell you.

Mr. McNamara: No cross examination.

Capt. J. B. Wood, for Deft., Direct.

652 CAPT. JACK B. WOOD, called as a witness by the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. FitzGerald:

Q. Please state your name, address and occupation. A. Jack B. Wood, St. Albans, Vermont, Treasurer of the Central Vermont Railway, Inc.

Q. Were you in the service during the war, Captain? A. Yes, sir.

653 Q. What outfit were you with, Captain? A. I was with the 103rd Machine Gun Battalion.

Q. That is the 26th Division? A. The 26th Division.

Q. Did you ever have the command of B Company? A. I did.

Q. And you were in action with the 26th, were you? A. I was.

Q. And have you been under fire? A. I have been.

Q. Captain, what size crater would a 157
654 make in ordinary soil—sandy soil? A. Oh, my recollection is that it would be—

The Court: How is this material?

Mr. FitzGerald: There was testimony here as to the size of the crater of this shell supposed to have caused this damage.

The Court: Are you going to give an opinion it wasn't that size?

Mr. FitzGerald: Here's a witness who saw shells all over France—

The Court: Quite likely, but is his opinion admissible tending to show the particular one was not such and such a size? 655

Mr. FitzGerald: There wasn't any particular testimony as to any particular shell hole. Mr. Bell told the story of the war yesterday, he went in one direction and believed Mr. Lumbra went in another.

The Court: The soldier boys told what the shells did there. They said the holes in the ground were made at the time; they didn't see any particular shell make it. 656

Mr. FitzGerald: The Captain was on that front in command of one of the units; he saw holes made at that time.

The Court: But not this particular shell or this particular hole.

By the Court:

Q. Did you see this locality at the time he was injured? A. I don't remember that he was injured, or don't remember Lumbra but I was in on that front then within a very short distance of it—I would say within a kilometer of it: within approximately a mile. 657

Mr. FitzGerald: Is he permitted to answer that question?

Mr. McNamara: It is entirely immaterial.

The Court: You are right and you may have an exception. If it can have the least force and effect in aiding this jury in deciding whether this soldier is totally in-

658 capacitated is beyond my comprehension, but go ahead. I am opening this to give you great latitude.

Q. Withdrawn.

The Court: That is a very sensible thing to do.

Q. Of what Company were you in charge at the time that the organization was demobolized? A. Company B, 103rd Machine Gun Battalion.

Q. Is that your signature, Captain (indicating)? A. That is.

659 Q. And is that (indicating)? A. That is my signature.

Mr. FitzGerald: I wish to offer these (handing papers to attorney for plaintiff).

Q. Captain, in B Company of the 103rd was there anybody on Permanent K. P. because of physical disability? A. Well, I can answer that question if I may—

Mr. Sylvester: We object to it. I don't see how it affects this claimant whether anyone else was or not.

660 Mr. FitzGerald: I said was anyone?

Mr. Sylvester: Or anyone. I object on the ground it is immaterial whether any other soldier or soldiers was on K. P. duty.

The Court: What is K. P.?

Mr. FitzGerald: Kitchen police.

The Court: On a particular day?

Mr. Sylvester: He hasn't stated in his question.

By the Court:

Q. Were you there in the kitchen so you know

who was there? A. Your Honor, if I may say 661
permanent—

Q. Were you there to see who was on kitchen police in that particular kitchen? A. The Company Commander assigns the men who go on to kitchen police each day.

Q. Were you there to see who was working in the kitchen? A. Yes, sir.

The Court: All right, you may ask him if this man was.

Mr. FitzGerald: If the Court please, I don't think it at all material. It is the 662
reason for him being there,—that is the reason for it being material.

The Court: I thought you were going to prove he wasn't there.

Mr. FitzGerald: No, your Honor. He was the Company Commander then.

By Mr. FitzGerald:

Q. When were you Company Commander? A. My recollection is I assumed command of B Company in the latter part of January or February, 1919. 663

Q. You were in command until when? A. Until the organization was disbanded.

The Court: That is after this boy says he was in the kitchen to work.

Mr. FitzGerald: He was still on it on his testimony.

Q. Do you know whether or not he was and the reason for him being?

The Court: No, this man didn't send him there.

664 Mr. FitzGerald: This man said he was on account of physical disability and I think we have reason to show he was not by the man who could have taken him from there. I say the Captain knows the reason he was there, and I want him to state to the jury—

The Court: The Captain did not send him there.

Mr. FitzGerald: No, but he said he knew the reason for him being there and
665 could have taken him away from there.

The Court: Go on.

Q. Do you know whether or not he was on K. P. and the reason for him being there? A. When I took command of the Company Lumbra was on K. P. due to the fact that he had been on there for a considerable time and—(interrupted).

By the Court:

Q. How do you know that? A. From the service records, sir.

666 A. (Continued) and he was an efficient man in the kitchen and the cooks wanted him.

By Mr. FitzGerald:

Q. And that is why you kept him there? A. That is why I kept him there.

Mr. Sylvester: We ask that be stricken out.

The Court: No, let's leave it in. The Government wanted him there because he was a good workman.

Mr. FitzGerald: The Captain kept him there for the benefit of his organization.

The Court: That wouldn't be any reason why he shouldn't have his insurance, if he was totally incapacitated. 667

Witness: May I go on?

The Court: I don't know.

Q. Captain, when you signed this physical report, did you ask the man as to his condition? A. Yes.

Q. You reported no disability at that time (referring to Def. B)? A. Yes.

The Court: What is that?

Mr. FitzGerald: His service record, kept right from the time he entered the service until he was discharged. 668

The Court: That shows at the time of discharge, he said he was all right and wanted to get out of the army and go home?

Witness: Yes, sir.

GEORGE P. BERRYMAN, called as a witness by the defendant, being duly sworn, testified as follows: 669

Direct Examination by Mr. Hession:

Q. Just state your name and address? A. Geo. P. Berryman, Paymaster of the Central Vermont Railway, St. Albans.

Q. As such have you custody of the records of the Central Vermont Railroad, the payrolls? A. I have them, yes, for a time;—after which they're filed.

670 Q. And under summons of this Court have you brought them here? A. Yes.

Q. And you have those records with you now? A. Yes.

Q. Those pertinent to the case of this Newton Lambra we have been talking about? A. Yes, sir.

Q. Will you refer to those records and tell us when he first went to work?

The Court: We had a man on the stand who told us all about when he went to work
671 and what time he lost, the percentage. Are you going to change what that other man said?

Mr. Hession: I wasn't here. I don't know what he testified to.

The Court: The man testified when he worked and the percentage of time lost.

Mr. Hession: We have the original records which is the best evidence on the subject.

Q. When did he go to work there? A. July
672 12, 1922.

Q. Now at about that time did he make an application for employment and have you that application with you? A. I have the application here.

Q. What is the date of it? A. Dated July 12, 1922.

Q. Refer to that application and tell us what it states?

Mr. McNamara: I object to that.

The Court: No, we don't want to take the time to listen to all that.

H. P. Berryman, for Deft., Direct.

Q. Will you read on that this question (interrupted)? 673

The Court: You take it and read it yourself.

Mr. Hession: I thought there might be some question whether it is admissible?

Mr. McNamara: I think there is; we haven't seen that paper.

Mr. Hession: This is an application giving his name and address; Have you any physical defect such as deafness or shortness of breath rendering you unfit for employment on the railroad? The answer is "none." That is dated July 12, 1922, and on the back is condition on admission to the service, the applicants for position in the shop service must be over 16 and under 50 years of age. 674

The Court: We won't put that in.

Mr. Hession: I insist on reading this sentence: It is signed by him, certifying he read that and agreed to it. That makes it admissible, I take it. Applicants for position in shop service must be over 16 and under 50 years of age; they must be able to read and write; be free from all bodily complaints and of a strong constitution. I, the undersigned, have read and hereby agree to the above conditions. Signed by Newton W. Lumbra, and witnessed by Wm. R. Sampson. The objection I understood was to the document. 675

The Court: The objection was overruled.

676 Q. At sometime did he leave the employment there? A. Yes, sir.

Q. And when?

The Court: You have been all over that.

Mr. Hession: It is the same question again. He made another application. He made two further applications for employment and these are the ones I am anxious to get in.

Q. Have you further applications for employ-
677 ment in those records? A. February 20, 1924. This application is dated February 12, 1924.

Q. May I have those two? A. And the other one December 15, 1924.

By the Court:

Q. Did he sign the same kind of a statement? A. Yes.

Mr. Hession: On the question: "Have you any physical defects such as deafness
678 or shortness of breath, rendering you unfit for employment on the railroad?" the answer is "No." That is December, 1924; and the same statement on the back, that he had read the profession that he was free from all bodily complaints and of a strong constitution; and the same statement on February 18, 1924, answering "no physical defects," with the certification he had no bodily ailments, with this additional proviso: "Have you ever been in the service before, if so, state reason for

leaving it." Says: "Left the service on 679
my own accord," and on the statement of December 1924: "Have you ever been in the service before?" stated: "Resigned on own accord." Now perhaps I can shorten it by looking through some of these.

By Mr. Hession:

Q. Have you his total earnings during the period of his employment? A. Yes, sir.

Q. And that employment began in 1922? A. 1922.

680

Q. Will you tell us what his earnings were for that year? A. Began in July 1922, the total earnings for the year $510.45.

Q. That was through December 31st? A. Yes, sir.

Q. Now the next year? A. 1923 from January to the latter part of May $464.92.

Q. That is all he worked there that year? A. That is all he worked that year.

Q. Is the reason for his leaving on the records? A. "May 1924 resigned own accord May 681
12, 1924."

Q. '23 I think the date is. A. I beg pardon—"May 1923, May 16, 1923 reduction in staff."

Q. And again after his re-employment, will you give the date of it and his earnings? A. 1924, February 18 re-employed, and worked in the last week in February up to September 5, 1924 when he resigned. The earnings in that period $304.-86 for that year.

Q. Was that continuous employment there? A. I beg pardon—there was also two weeks he

682 worked in December that went into that total. The employment is not continuous in '24.

Q. When does it break off in '24? A. The middle of May until I can give you the dates here (indicating other paper) from May 12, resigned; August 5, 1924 re-employed; September 5, 1924 resigned; December 12, 1924 re-employed in the freight yard.

Q. So that wage was from February to May; August and September and sometime in December, is that correct? A. Yes, sir.

683 Q. And 1925?

By the Court:

Q. Did he work in January '25? A. Yes, all of January practically; the record shows continuous work every week in 1925 except —

Q. Did it show he worked every day? A. This record doesn't.

Q. You have made a record here that showed he did. Did you make that record showing the percentage of time he worked and didn't work?

684 A. No, sir.

Q. Didn't someone in your office? A. No.

Q. Did you hear Mr. Noell testify this forenoon? A. No, sir.

By Mr. Hession:

Q. Is all your testimony from the actual records? A. Yes. Yes, that is all I can go by.

Q. Does the record show continuous employment in the year 1925? A. I would have to go through each payroll, day by day, to get that.

Every week except the second in August he was on the payroll. 685

By the Court:

Q. You don't mean by that he worked every day of the week? A. No, I couldn't say that from this record.

The Court: Do these records show how much of the week he worked?

Mr. Hession: Yes, they do and I think it is rather necessary they be read in.

Q. Does that card show you what he worked each week in January? A. I have the record here which does. This card is the summary of the original records. 686

Q. Does it show how much of each week he worked? A. It showed how much pay he drew for each week.

The Court: One of your men here this morning had it all put up in percentages for each month, which makes it much clearer, I think.

Mr. Hession: I think the records here will show how many hours he worked a day. 687

Mr. Sylvester: The records Mr. Noell testified from this morning were taken from those records there. There cannot be any material difference.

Mr. McNamara: The Government was furnished with an hourly record and the day record of this man's entire time.

Mr. Hession: We haven't an hourly record.

688 Mr. McNamara: We have one.

Mr. Hession: I think we have a right to put them in. These are the best records.

The Court: We will start in at nine o'clock tomorrow morning and you may take all day to put them in if you wish.

Mr. Hession: I don't care to take all day.

(Adjourned at 5:15 p. m.)

689

(Wednesday, April 20, 1932, 9 a. m.)

GEORGE P. BERRYMAN, re-called:

Direct Examination by Mr. Hession (continued):

Q. Mr. Berryman, referring to your records, will you tell when this man first became employed for the railroad? A. July 12, 1922.

690 Q. And when that employment terminated? A. May 16, 1923.

Q. And the reason? A. Reduction in staff.

Q. And when he was employed again? A. February 18, 1924.

Q. And when that was terminated? A. May 12, 1924.

Q. And the reason? A. Resigned own accord.

Q. And when he again became employed? A. August 5, 1924.

Q. And the length of that employment? A. 691
Resigned September 5, 1924.

Q. And when again he became employed? A. December 12, 1924.

Q. And when was the first termination of that employment beginning December 12, 1924? A. August 23, 1926, granted six month leave of absence.

Q. So during the year 1925 he was with the railroad the entire year? A. Yes, sir.

Q. Now will you refer to the payrolls for the year 1925. Now on those payrolls is the time a 692
man actually punched, himself, going to work and leaving work, shown? A. These payrolls—clock sheets, taken from time clocks, and the time is punched in and out in the morning, and in and out in the afternoon by the man himself.

Q. Now beginning with the first week in January, will you tell us how much time, if any, was lost that week, and then go right through the year that way? A. This week begins December 28, 1924 and ends January 3, 1925. Just what do you want on that, the number of hours? 693

Q. The time lost. A. The time lost—January 1st, which is a holiday and the men didn't work on that day; no time lost aside from the holiday.

Q. By the way, what time did he go to work in the morning, from that time sheet? A. Seven o'clock; the time is punched in at seven o'clock the first time,—6:46 and 6:50. The time starts from seven o'clock.

Q. When did it end the day's work? A. At

694 four in the afternoon except on Saturday when it ended at noon.

Q. That is an eight hour day? A. That is an eight hour day except Saturday.

Q. Now take the next week and go right through? A. The week ending January 10, no time lost, on the 5th, 6th, 7th, 8th, 9th or 10th, no time lost.

Mr. McNamara: We will concede from the testimony already introduced there's no time lost in the month of January.

695 Mr. Hession: You concede that for the entire month of January there was no time lost. All right, we will start February.

A. (continued) no time lost in that week.

Q. That is the first week of February? A. The first week ending February 7th and worked full eight hours Saturday. No time lost on the week ending February 14th; they worked half a day Saturday. No time lost on week ending February 21; they worked a full day Saturday. February 22nd was Sunday and the 23rd was a holi-
696 day, no time worked on that day.

Q. By that you mean the department was closed? A. The department was closed except for certain essential men had to be there. On February 27 worked from 6:50 in the morning until 12 noon; half a day lost there. February 28th worked--Saturday, worked a full day. That concludes February.

Q. Yes,—now March? A. The week ending March 7; no time lost; and the week ending March 14 started work at noon,—worked from one

to four; didn't work in the morning. No time lost the rest of that week. In the week ending March 21 didn't work on March 18 and 19; full time the rest of the week. Week ending March 28 didn't work March 24, 25, 26, 27 or 28. The 29th was Sunday. Didn't work March 30, 31, April 1st; worked full time April 2nd, 3rd and 4th. Week ending April 11 worked full time. Week ending April 18 worked full time. The week ending April 25, on the 22nd he quit work at 3:20, which was forty minutes before closing time; the rest of the week full time. Week ending May 2nd, on May 1st he worked—was ten minutes late in the morning and worked until noon; didn't work in the afternoon. May 2nd worked full time. The week of May 9th didn't work on the 4th or 5th, and on May 8th lost a quarter of an hour because he punched out before four o'clock—3:59. On the week of May 16th was twenty-five minutes late in the morning and punched in at 7:25;—worked full time the rest of the day. On May 15th again punched out a minute ahead of time and lost a quarter of an hour for that reason. May 16th full time. The week ending May 23rd didn't work on May 18th, full time the rest of the week. The week ending May 30th worked full time that week. May 30th was a holiday and there was no work in the shop. The week ending June 6th worked full time. The week ending June 13th didn't work on Saturday, June 13th. The week ending June 20th didn't come in to work June 15th until noon,—worked from one to four; the rest of the week full time.

697

698

699

700 The week ending June 27th full time. Week ending July 4th worked full time except July 4 when the shop was closed. The week ending July 11th worked full time. The week ending July 18th didn't work July 16, 17 or 18. The week ending July 25th, no time shown in that entire week.

Q. Does that mean he was off entirely that week? A. No; he—his name was carried on this clock sheet but he was transferred to what they call "Italy Yard" at St. Albans, a car inspection point.

701 Q. That was a different place from the building where he had been working? A. Yes, he worked outside from July 22 to September 4.

Q. Did he have to punch the clock then? A. No; that is a different department. I haven't the time sheets for that month; they're in a different department and I evidently did not get hold of them. I can tell you the amount of wages he earned in that period. The week ending July 22 $11.28; July 29 $26.32; the first week in August $22.56; the second week in August he didn't earn
702 any time; the third week in August $26.32; the fourth week in August $26.32 and the fifth period in August $23.50.

Q. Does it show what his hourly rate was; how much did he get an hour? A. In 1925, July 20, 1925 employed as car man helper at Italy Yard 47 cents an hour, and September 5th he was back to 35 cents an hour. The week ending September 12th he was back in the shop, worked a half a day on September 8th, and he worked in the afternoon of September 8th and worked the

morning of September 11th; worked full time September 9 and 10 and full time September 12. The week ending September 19 he worked full time all week. September 26—no time shown for September 26; full time all the other days. The week ending October 3rd full time. The week ending October 10th full time. The week ending October 17th, punched in at 7:28 in the morning and thereby lost half an hour; the rest of the week full time. The week ending October 24th full time. The week ending October 31st full time. The week ending November 7th full time. The week ending November 14th did not work on November 11th,—shop closed. 703 704

Q. The entire shop was closed you say? A. The entire shop was closed Armistice Day. He worked full time the rest of that week. The week ending November 21st punched in at 7:53 on November 20th and lost one hour; full time the balance of the week. The week ending November 28th the shop was closed on November 26th, evidently Thanksgiving Day; worked full time the balance of that week. The week ending December 5th did not work December 2nd; came in at noon and worked until four o'clock December 3rd,—one o'clock to four; worked full time the balance of that week. December 12th, on December 12th came in at 7:24 A. M.—lost half an hour; worked full time the rest of that week. The week ending December 19th worked full time. The week ending December 26th, December 25th the shops were closed; worked full time the rest of that week. The balance of that year would be in 1926—the other few days. 705

G. P. Berryman, re-called for Deft., Cross.

706 Q. That is for the year 1925 you have just read the records? A. For the year 1925, yes, sir.

Q. Now will you turn again to the documents that you had yesterday and let me have the applications for employment.

Mr. Hession: I want to offer these your Honor.

The Court: Admitted.

Mr. McNamara: May it appear that these are not in the handwriting of the
707 plaintiff. He has signed certain papers but where the questions are answered it is not in the handwriting of the plaintiff.

The Court: If he didn't sign them, it isn't admissible.

Mr. McNamara: We think he did sign them, but where the questions are answered, that is made out by some clerk and he simply signed the paper he was handed to sign.

Mr. Hession: Of course, he is bound
708 by them if he answered them.

The Court: They are evidence against him for what they are worth. They may be worth much and may not be worth anything.

Mr. Hession: That is the way with all evidence, your Honor.

The Court: No, not all.

CROSS EXAMINATION by Mr. McNamara:

Q. Do you know, Mr. Berryman, if records were taken from the sheets which you have had

here and the record that Mr. Noell testified to yesterday was made up from those sheets? A. I—that is the only way I should say they were. I don't know of any other source where he could get them. 709

Q. And these records you have came from Mr. Noell's office? A. Yes, sir.

Mr. McNamara: That is all.

NEWTON W. LUMBRA, re-called: 710

RE-CROSS EXAMINATION by Mr. FitzGerald:

Q. You filed claim for compensation, Mr. Lumbra? A. Yes, sir.

Q. Is that your signature, sir? A. Yes, sir.

Q. And this (indicating)? A. Yes.

Mr. FitzGerald: The Government would like to offer these your Honor. 711

Mr. McNamara: No objection; they were in before.

The Court: Admitted. (Def. Exs. F and G.)

Q. Mr. Lumbra, as a result of the claim for compensation you filed, you are now drawing about a hundred dollars a month?

Mr. McNamara: We object to that. It is immaterial and inadmissible in every way. That has no bearing on this case, whether or not this man is disabled under

712 the provision of the contract of insurance he had with the United States Government. It isn't any more admissible than if the City of St. Albans was keeping him now or if he had inherited a hundred thousand dollars since then.

Mr. FitzGerald: It is offered to show why he did not work. The compensation began in 1929 and he hasn't worked since then.

The Court: Suppose he was a rich
713 man—would that be admissible to show he was not incapacitated?

Mr. FitzGerald: No, to show why he did not have to work.

The Court: It doesn't necessarily follow because he is a rich man he doesn't work. Usually rich men are rich because they do work.

Mr. FitzGerald: That isn't necessary either, he might have inherited it. This
714 is offered for what it is worth—to show why he has not worked; as a reason why he has not worked.

Mr. McNamara: That is going back to the same type of evidence raised yesterday. We say all possibilities are not evidence. There should be some probability. If they can show this man quit and said the reason he quit was because he got some compensation, or something of that nature, I say yes, but the only evidence is this man attempted to work and has

tried to get all kinds of employment since 715
that time.

Mr. FitzGerald: There isn't any evidence in this case—

Mr. McNamara: We say Dr. Davidson's testimony was he did instruct the railroad this man should not be employed there any more, and thereupon was discharged.

The Court: Because it was unsafe to employ him.

Mr. McNamara: Yes, and we say since 716
then we showed by the City Manager, who was carrying on a big construction project that year and was hiring all sorts of men,—this man came to him and tried to get work but he wouldn't hire him. If this man hadn't worked at all it might have some bearing, but under the facts existing here, we say they're put in to create some prejudice and we say they're immaterial, by reason of prejudice. Anything prejudicial should not be admitted. 717
It has no tendency to prove or disprove any issue in this case.

The Court: The evidence being that he did work a good deal of the time up to the time the railroad Doctor directed the railroad should not employ him. Now you say that because he got compensation, that that is the reason he hasn't worked since then?

Mr. FitzGerald: I say that is evidence

718 of such reason. I don't say it is conclusive at all but it is being offered for the consideration of the jury.

The Court: The most it could do would be to have a tendency to show the man didn't have any motive to work.

Mr. FitzGerald: It wasn't necessary, yes.

Mr. McNamara: Then that is trying to build an inference on an inference, which isn't admissible in any way.

719 The Court: No, that wouldn't be an inference on an inference, would it?

Mr. McNamara: I think it would; drawing the inference because he may have had some compensation, he may have had no motive for work.

The Court: That is the fact, he had compensation. That he's perfectly well and able to work, but since he was discharged, he hasn't worked because the Government gave him compensation.

720 Mr. McNamara: I say there're a double inference being drawn there.

The Court: I cannot follow you on that.

Mr. McNamara: First, that he's able and could have worked, and second, he would not because he had some compensation.

The Court: I don't think that is quite it. The fact he's got some compensation from the Government because he's a soldier,—when did he get this?

N. W. Lumbra, recalled for Plff., Re cross.

Mr. FitzGerald: I don't recall the exact date. 721

Mr. McNamara: 1929.

The Court: After he was discharged?

Mr. FitzGerald: Yes, your Honor. Mr. Lumbra can answer that question. I don't recall the exact date.

The Court: Don't the records show?

Mr. FitzGerald: Yes, your Honor.

The Court: Well, gentlemen of the jury, it wouldn't make any difference if the Government have insured the soldiers 722
who paid so much a month for insurance. Now to make it perfectly clear, the Government has also passed a law since the World War that certain soldiers are entitled to a pension, even though they were not injured in the war, and certain other laws that the soldiers who were injured should draw certain compensation; 25 per cent if incapacitated that much; if 10 per cent he gets so much, and so on. It 723
wouldn't make any difference how much compensation a soldier boy might draw, he would still be entitled to his insurance if he has become totally disabled from his service in the war; that is, before his policy lapsed. The fact of the soldier getting compensation has no force or effect on his insurance whatever, but now the Government says here's a policyholder who worked down to 1929, off and on, at different times, as you have heard

724 the evidence here, and that the railroad Doctor in 1929 directed the railroad to discharge him,—it was dangerous for the railroad to have such a man in their employ, and some other evidence is it was dangerous for the man himself. Now I am going to admit this evidence against the plaintiff's objection and exception, as to when and how much compensation he received, but I want to be emphatic to you,—make it clear that the law is if he
725 was getting ten thousand dollars compensation, or whatever sum he was getting as compensation, he is still entitled to his insurance,—however much compensation he is getting,—if he has become totally disabled. There is some likelihood that a person not trained in the law might say "why here's a man that is getting enough any way without his insurance; he's being well used any way." Now that isn't the law. However much compensation he
726 may be getting, he is still entitled to his insurance if he has become totally disabled, because the insurance is something he bought and he paid for. To pay for that insurance the Government deducted a certain amount each month from his pay, and that cannot be done away with by the Government giving a man a pension afterwards or giving him compensation, and there's a great difference between pension and compensation, because

a pension is given, you know, to even 727
widows of old soldiers who are now living,—soldiers in the Civil War. That is a gratuity, given to old soldiers in the Civil War when they got old, whether injured in the war or not, but compensation is given to soldiers in the World War and is given for injuries they received in the war, and with that explanation you may put in your evidence. I want you to make that clear to them in your discussion, Mr. Attorneys for the plaintiff. 728

Mr. FitzGerald: If the Court please, I think there was a mis-statement of what the law is on his right to collect. Your Honor no doubt meant while the policy is in effect, he is entitled to collect if he has become totally disabled.

The Court: From his service in the war.

Mr. FitzGerald: No, he must have been permanently and totally disabled on May 31, 1919, from any cause. If he subsequently became permanently and totally disabled, that would not be sufficient. 729

The Court: No, of course, it would not. If he became totally and permanently disabled while he was in the army,—and he may not have known it then; his doctors may not have known it then.

Mr. FitzGerald: He would know more about his condition than anyone else your Honor.

730 The Court: He might and might not. He doesn t have to discover that he was injured to such an extent that he was in fact permanently and totally disabled before his policy expired. For instance, a man, a soldier goes in the army and he gets tuberculosis while in the army, and he goes on to work, and lives on for a quite a while. Being a slow disease he isn't aware he has tuberculosis; Doctors are not aware of it, but his working after he got tuber-

731 culosis was really suicide, but he didn't know it. So here is a soldier who the Doctors say now has epileptic fits,—that is the lay term;—the public refers to those things as epileptic fits;—it is a pretty good description. Now if he received an injury to his brain from that explosion, that Dr. Skeels has testified he was not aware of for quite a long time, a very long time. He worked and the work he did in-

732 creased the trouble he was having; increased the dizziness and so on and so on, and that the work he did did him harm, then it is for you to say gentlemen, whether he was in fact permanently and totally disabled when his policy expired,—which was about the time he was discharged. The policy expired in this case on the 29th day of May 1919. Now he got home about—

Mr. FitzGerald: April 29th he was dis- 733
charged.

The Court: Yes, and the policy ran thirty days more. He got home in April sometime?

Mr. FitzGerald: Yes, your Honor.

Q. As a result of that claim, you have drawn compensation, Mr. Lumbra? A. When it started you mean?

Q. Yes. A. Yes, 1924.

Q. You have been drawing compensation right along since then? A. Yes. 734

Q. How much are you getting now? A. The rating is 105 a month.

By the Court:

Q. How much did you get? A. I get $94.50 and the oldest daughter by my first wife gets $10.50.

RE-DIRECT EXAMINATION by Mr. McNamara:

Q. You haven't been getting that but a little 735
while? A. Only a little over a year.

Q. From 1924 up to then, how much were you getting? A. When I first got rated I got 10 per cent, and then I got 21 per cent, and 45 per cent and 70 per cent.

Q. Now you are on a hundred per cent basis? A. A hundred per cent basis.

Q. And that is of service origin, is it? You are even rated now as a hundred per cent disabled

736 for compensation, from disability incurred in the Government service? A. Yes.

Q. Tell us how much that ten per cent was, how much a month? A. Around nine or ten dollars a month.

Q. Around nine or ten dollars? A. If it was a permanent rating it would be ten dollars a month.

Q. Do you remember how much the 21 per cent was? A. $19.84.

Q. And the different other rating? A. 45
737 per cent paid $42.50.

Q. When did that start? A. That started when Dr. O'Neil examined me in 1927 and they cut me down once after that to 21 per cent, and raised me back up again in 1929. Then again in the latter part of 1929 or '30, I don't remember they raised me to 70 per cent and gave me $67.00 a month, and then they raised me to a hundred per cent in August 1930.

Mr. FitzGerald: At this time I would like to file a motion for a directed verdict.

738 The Court: Have you any evidence in rebuttal?

Mr. McNamara: No.

The Court: Read it.

Mr. FitzGerald:

Motion for Directed Verdict.

"UNITED STATES DISTRICT COURT, 739

DISTRICT OF VERMONT.

NEWTON W. LUMBRA,
v. No. 8167
UNITED STATES OF AMERICA

MOTION FOR DIRECTED VERDICT. 740

Now comes the defendant in the above entitled action at the close of all the evidence and moves for a directed verdict in its favor on the ground that upon all the law and the evidence in this case the plaintiff is not entitled to recover for the reason that the plaintiff has not proved he was permanently and totally disabled on or before May 31, 1919; and that the evidence introduced in the case is insufficient 741
to support a finding that the plaintiff was permanently and totally disabled on or before the 31st day of May, 1919.

HARRY B. AMEY,
U. S. Atty. for the
District of Vermont.
By FRANCIS J. FITZGERALD,
Assistant Insurance Attorney."

Preliminary Charge.

742 The Court: You make that 31 and I make it the 29th.

Mr. FitzGerald: The war risk insurance was paid for the month and even though he were discharged on the 29th, it would have been paid for the rest of April, and he would have 31 days grace, which would be May 31st.

The Court: I think this is a case to be decided by the jury. It is not for the Court. There's evidence here from which
743 the jury can well find he was permanently and totally disabled on the 31st day of May, 1919, and that being so, it is the plain duty of the Court to submit the case to the jury.

Mr. FitzGerald: Exception.

The Court: Exception, yes.

Mr. FitzGerald: The defendant rests.

(9:52 a. m.)

744 The Court: Before you make your arguments, I am going to charge the jury on the law. I think it will make it plainer and be helpful.

I am going to tell you, gentlemen, how I am going to submit this case to you. It will be very brief. I always make a Charge in writing and give it to the attorneys on each side, and I will use the same Charge I had in the other trial, or just change that May 31 from May 29, and adding one month.

Now there's only one principal question of fact, gentlemen, for you to decide: Was the plaintiff permanently and totally disabled by his services as a soldier in the World War, by injuries to his nervous system from the explosion, when his insurance expired on the 31st day of May, 1919? That is the question for you to decide. Did he go into the war a sound man in health and come out a ruined man in health so that he could not work continuously at a gainful occupation, notwithstanding neither he nor his physicians were aware of his affliction until much later? 745 746

Now you want to know what total disability is, and what permanent disability is, and the higher court, the Circuit Court of Appeals, has told us what permanent disability is within the meaning of this insurance policy. We have spoken of an insurance policy here. The Government did not actually write an insurance policy and give it over to the soldiers as the private Insurance Companies do, but all they did was they put a man's name down as being insured for so much, and deducted so much from his pay, and then the Act of Congress is the policy. That Act of Congress authorizing the insurance is the policy. 747

Now as I say, you want to know what is permanent disability, so the higher courts have told us, and I was very much surprised when they told us what it was. I think you will be very much surprised. A total disability is any im-

748 pairment of health which made it impossible for the insured to follow continuously a substantially gainful occupation. Now that is a short definition and it means a lot. If he was able to follow a gainful occupation only spasmodically and with frequent interruptions due to his disability, he was continuously disabled.

The word "continuously" means with reasonable regularly. It does not preclude periods of disability which are ordinarily incident to ac-
749 tivities of persons in generally sound health. A good test or illustration of total disability is: Has his service in the war, the injuries which he received by the explosion, compelled him to drop out of the ranks of the workers of the world and stand by the side of the road and watch the world go by? I have taken that word for word from a decision of the Circuit Court of Appeals.

If employers won't hire him after they have learned of his actual condition, because of that
750 condition, he is totally disabled within the meaning of the law, notwithstanding he is physically able to do many kinds of manual work.

The Government contends that the plaintiff is physically and mentally able to work at a gainful occupation a large part of the time, but if you find that employers refuse to employ him because he is too frequently sick, or because he is unable to do a good day's work, or because there is danger from such a workman who suddenly

has faint spells, dizzy spells, epileptic fits or con- 751
vulsions, then he is totally disabled.

A total disability is permanent when it is of such a nature that renders it reasonably certain it will continue throughout a person's lifetime.

Now there is the law relating to a soldier's insurance, and the attorneys will discuss this case, and you feel free to ask them any questions as the discussion goes on, if you want to. I should have told you at the commencement of the trial 752
to ask the witnesses any questions, but I forgot it. Now the idea of a trial is to have the Judge and Jury thoroughly understand the case and the law applicable to the case. The jurors should feel free to ask questions. As I said, the question of fact here is for you to decide. The judge hasn't anything to say. It is what you think; not what the Judge or the Attorneys may think about it. The jury should decide it.

Now the testimony, Mr. FitzGerald, that went 753
in relating to his drinking intoxicating liquor—there wasn't any, was there, except his conviction, and that was admitted?

Mr. FitzGerald: I think that is all your Honor.

The Court: Well there wasn't any evidence then that his drinking intoxicating liquor caused his disability, was there?

Mr. FitzGerald: I believe there has been your Honor. The doctors who stated that the

754 excessive use of alcohol may cause this condition. I think it is a question for the jury to determine the worth of it.

The Court: But you haven't any evidence he used it to excess.

Mr. Sylvester: No.

Mr. FitzGerald: He admitted on the stand he was drunk twice, and that is excess, on his own statement. I asked him the question Mr. McNamara asked him if it were not the time when he was ringing the church bell in the steeple, and
755 he said "No, I was talking about another time," so that's two times he admitted on the stand your Honor.

Mr. McNamara: No.

The Court: But you didn't show when either of these occasions were.

Mr. FitzGerald: Mr. McNamara did that; both were after the war, and in Montgomery.

The Court: That isn't fixing it so we could say anything about when it was except it was since 1919.

756 Mr. FitzGerald: That is all, your Honor; between 1919 and 1921.

The Court: Why?

Mr. FitzGerald: Because he left Montgomery Center at that time.

The Court: That doesn't mean he might not have been back there.

Mr. FitzGerald: I believe he answered the question "Have you been back there since" and he said "no."

Mr. McNamara: No; the evidence is he has 757
been back there since.

The Court: It is only a little ways from St. Albans to Montgomery, and he being a Montgomery boy, he would be likely to go back there if he wanted to have a little spree.

Mr. Sylvester: The most any of these doctors testified was that it was possible. They haven't dared say it was probable. Even so, if he had plead guilty twice, that wouldn't be construed as excessive use of alcohol any way.

The Court: I don't think you or your associate 758
was very diligent in not finding out when these occasions were.

Mr. McNamara: If they don't prove it, I don't think it is incumbent upon us to prove it. I don't think it is necessary for us to prove anything for them.

Mr. Sylvester: I don't think it is material and didn't during the trial, and don't now.

The Court: Then I should commend you instead of finding fault with you.

Mr. Sylvester: I think so. 759

The Court: I think you are right about that. I suggested, you know, I would wait for you to give me some law?

Mr. FitzGerald: I think it is clearly established in the testimony, not only in this case, but medical science insofar as what may cause epilepsy, the reasons are so varied that it could be one of many causes. Dr. Skeels, the man who was the only one I believe who expressed a firm conviction,—first he stated that traumatic epilepsy caused by

760 an injury on the head, comes at any time. He also stated he did not believe this man had true epilepsy. Then he stated these nervous spells were something, and he didn't know what.

The Court: What I asked you about was the law, not medical science.

Mr. FitzGerald: The Court will take judicial notice, please, of those facts.

The Court: You don't seem to get my notion. I think the law is clear that the Court should not submit any question such as this is to the jury
761 to decide: Is his disability due to the use of intoxicating liquor,—unless the Government has some evidence tending to show his condition is probably due to it;—or, because there is a possibility, it is not sufficient; that it must be evidence that it probably is; not that it is absolutely certain, but that the probabilities are that his disability is due to his use of intoxicating liquor. Now that is the law, and if you claim it is different, you ought to show me some. I have asked you about it,—asked you to show me the law.

762 Mr. FitzGerald: The only answer I can make to that is that in this particular case the most serious condition Mr. Lumbra may have is epilepsy, and it is conceded by all that the causes of epilepsy are numerous and varied.

The Court: That isn't what I have asked you about. Show me some law to the effect if there is a possibility, that I could let the jury decide that possibility.

Mr. FitzGerald: I think it is a question of fact more than a question of law.

Mr. Sylvester: I don't think there is sufficient 763
evidence that question should even be submitted to the jury.

The Court: If there is a law, you will find it in the books. My books all read as I say. If there's any others that read differently, you ought to tell me about it so I can get them, if you don't care enough about it to bring them to me.

Mr. FitzGerald: These seizures are not a question of law. It is a question for the jury to decide,—did the man get it this way or some other way, and if so, when? 764

Mr. McNamara: The jury doesn't care what he got. It is not material.

The Court: It is a question of fact, but you don't go along with me on the proposition that there can be no question of fact on a mere possibility. It has got to be more than a possibility. It has got to be made probable by evidence; that is the way all my books read.

Mr. FitzGerald: If the Court please, on what theory was the testimony of witnesses as to the man's appearance admitted? There's nothing in the law books on that, is there? How he looked before the war or after the war? 765

The Court: There is no possibility about it. A person see him and said there was a change.

Mr. FitzGerald: It was a question of fact.

The Court: Well, go on with the arguments.

Mr. Sylvester made the opening argument for the plaintiff at 10:10 a. m.

766 The Court: That is a very poor explanation. If you think he is totally and permanently disabled, you return a verdict for the past monthly payments up to now, but next month the Government will say we won't pay; or six months from now they will say we are going to stop paying, or a year, or ten years, and the soldier, he can sue them again. The country has taken great pains to say on these insurance cases he is entitled to a trial by a jury; we won't take what any doctors say about it, or what any Board or Veterans
767 Bureau may say about it, or what any Judge of the Courts may say about it, but we will take what the jury may say about it in insurance cases.

(Argument resumed by Mr. Sylvester.)

(10:35 a. m. recess.)

Mr. FitzGerald argues for the defendant, at 10:44 a. m.

* * * * * *

"The witness testified he saw the crater made by the shell that exploded and threw
768 him. He was in the dugout and testified he left for the rear that night; there didn't anybody show that particular crater to him."

* * *

Mr. McNamara: If the Court please, counsel is arguing exactly opposite to the evidence in this case. The witness testified he saw the crater because the boys pointed it out to him. I don't like to interrupt counsel's argument—(interrupted).

The Court: Then I wouldn't, if I were you.

Arguments.

Mr. McNamara: (continuing) but if that is left on the record, I wish an exception to it. 769

Mr. FitzGerald: (resuming argument) If, gentlemen at any time I misquote the evidence, I assure you it is entirely unintentional and I know it won't be misleading because your twelve collective minds will readily straighten me out. There is testimony that Mr. Lumbra was in that dugout and that he left for the rear that night and he left there because he was not able to continue. This is a 75 foot dugout, under ground. How far it is from the surface on a slope, we don't know, but there's testimony it was seventy-five feet underground; they don't sink shafts,—there would be a slope. You know how far it would be from the surface on that slope down to that dugout. There must have been steps down to it. How is a man going to hobble out on a sprained ankle to look at a shell hole during a bombardment? 770

* * * * *

(Referring to testimony of Capt. Wood.)

Mr. McNamara: I object to that. The testimony was he never was asked anything about his physical disability. There was no question of that nature put to Capt. Wood. 771

The Court: It is for the jury to say what was said; not for me.

Mr. FitzGerald: (resuming argument) Capt. Wood signed that certificate when he came out of the army, that he knew of no reason why he was not O. K.—well and sound.

* * * * *

772 (Argument closed by Mr. FitzGerald at 11:42.)

Mr. McNamara makes closing argument for the plaintiff at 11:43 a. m.

(Noon.)

The Court: We will go to luncheon I think now and come in at two o'clock, gentlemen.

(Wednesday, April 20, 1932 2 p. m.)

Mr. McNamara resumes closing argument, finishing at 2:35 p. m.

773

Charge.

The Court: Gentlemen of the jury, there is only one principal question of fact in this case for you to consider and decide: Was the plaintiff permanently and totally disabled by his services as a soldier in the World War,—by injuries to his nervous system from an explosion, when his in-
774 surance expired on the 31st day of May, 1919? Did he go into the War a sound man in health and come out a ruined man in health, so that he could not work continuously at a gainful occupation, notwithstanding neither he nor his physicians were aware of his affliction until much later?

The burden of proof is upon the plaintiff to prove that he was totally and permanently disabled before his insurance expired on the 31st day of May, 1919.

Charge.

By burden of proof is meant a preponderance of the evidence, or to state it in other words, a fair balance of the evidence. That is, the scales must tip in the plaintiff's favor in order for him to prove his case as the law requires. This does not mean that he must produce more or even as many witnesses as the defendant, but it means after considering all the direct evidence in the case and all of the probabilities from the direct evidence and all the inferences to be drawn from the direct evidence, that you are more inclined to believe that he was totally and permanently disabled. The way you are more inclined to believe is a true test and the scales always tip in accordance with that belief without regard to the number of witnesses on a side. If the scales just balance or tip in the defendant's favor, then the plaintiff has failed to prove his case as the law requires and he cannot recover. 775 776

As to the credibility of the witnesses and the weight to be given to their testimony, the law is that you are not bound to give the same weight or the same credit or have the same faith in the testimony of each witness, but you should give their testimony just such weight and have just such faith in it as you think it is fairly entitled to receive. Consider their appearance on the stand while testifying;—their feelings or bias,—if any;—their interest in the result of the trial,—if any;—their means of information and the reasonableness of the testimony which they give, and believe as much or as little as you think you ought to. 777

Charge.

778 A total disability is any impairment of health which made it impossible for the insured to follow continuously a substantially gainful occupation. The word "total" as applied to disability does not necessarily mean incapacitated to do any work at all. If he was able to follow a gainful occupation only spasmodically and with frequent interruptions due to his disability, he was continuously disabled. The word "continuously" means with reasonable regularity. It does not preclude periods of disability which are ordinarily
779 incident to activities of persons in generally sound health. Most all of us, however good our health is, occasionally, at times we have to lay off for some reason or other.

A good test or illustration of total disability is: Has his service in the war or injuries which he received by the explosion, compelled him to drop out of the ranks of the workers of the world and stand by the side of the road and watch the world
780 go by? A good test,—an accurate illustration of total and permanent disability,—that has been written into the books by the higher Court.

If employers won't hire him after they learn of his actual condition,—because of that condition,—he is totally disabled within the meaning of the law, notwithstanding he is physically able to do many kinds of manual work.

The Government contends that the plaintiff is physically and mentally able to work at a gainful

occupation a large part of the time, but if you find 781
that employers refuse to employ him because he is too frequently sick, because he is unable to do a good day's work, because of the danger from such a workman, a workman who suddenly has faint spells, dizzy spells, epileptic fits or convulsions, then he is totally disabled.

A disability is permanent when it is of such a nature that renders it reasonably certain it will continue throughout a person's lifetime.

782

If you find and decide that the plaintiff was permanently and totally disabled, as defined, on or before his insurance expired on the 31st day of May, 1919, he is entitled to recover the insurance payments due him of $57.50 a month from May 31, 1919 to March 31, 1932, inclusive, 155 months, amounting to eight thousand nine hundred twelve dollars and fifty cents ($8,912.50) and your verdict will be for that amount. He is not entitled to recover any interest.

783

If you fail to find he was totally and permanently disabled, as defined, on or before his insurance expired on the 31st day of May, 1919, he is not entitled to recover anything and your verdict will be that the defendant is not liable.

The Court: Have the attorneys for the plaintiff any exceptions they wish to take to the Charge as given?

Mr. McNamara: No exceptions.

784 The Court: Mr. FitzGerald?

Mr. FitzGerald: Yes, if the Court please, I would like an exception to that part of the Charge which states he would be totally and permanently disabled when neither he nor his physicians knew it. A man would be the best judge of his own condition.

The Court: Have you any law to that effect? I don't want to hear any argument about it.

Mr. FitzGerald: It is the evidence in this case. We object to that point because doctors have testi-
785 fied that men with epilepsy could work without endangering their health.

The Court: One doctor did;—two or three others testified it would.

Mr. FitzGerald: The testimony in here has been by doctors that persons with epilepsy don't endanger their health by working.

The Court: The exception was to what I said "when neither he nor his physicians were aware of his affliction until later." I stated the law as the higher Courts have stated it and unless you
786 have something later?

Mr. FitzGerald: The only statement I wish to make is what I have made. May I have an exception?

The Court: You say because certain doctors testified here that persons who were nervous could work without injuring themselves, that I should not charge the law of the land?

Mr. FitzGerald: I don't think that Charge fits this case, and that is why I am asking for an exception.

The Court: I am asking you,—not what you think about it,—I said the higher Courts have decided that the law is just as I have stated it and unless there's some decision that I haven't seen, —and if you have a decision to that effect, why I will be glad to have you tell me where it is, so I can look at it and correct my Charge. 787

Mr. FitzGerald: If I had a citation on it I would have furnished it to you. I am merely asking an exception on it your Honor.

The Court: You say you haven't any case?

Mr. FitzGerald: Not in hand at this moment. 788

The Court: Very well, take your exception; because if you do know of a case, you should tell me about it so I can change my charge.

Mr. Fitzgerald: I would like an exception also your Honor to that part of the charge—"Has his service in the war or injuries which he received by the explosion, compelled him to drop out of the ranks of the workers of the world and stand by the side of the road and watch the world go by?" You must find that condition prevailed on or before May 31, 1919; not what may have happened subsequently. 789

The Court: That is taken from the Circuit Court's opinion word for word.

Mr. FitzGerald: I am familiar with that opinion. May I have an exception?

The Court: Certainly. You don't have to get it from me. I haven't anything to say about it.

Mr. FitzGerald: I would like an exception also your Honor to that part of the Charge "If employers won't hire him after they learn of his ac-

790 tual condition"; they must find that condition prevailed in 1919.

The Court: That language is taken from the Circuit Court opinion too, word for word.

Mr. FitzGerald: Exception.

The Court: If you have anything later that changes that, you ought to tell me about it. Have you?

Mr. FitzGerald: I have no citation your Honor.

The Court: You are familiar with the case in which that was held, of course? If employers
791 won't hire him you are familiar with that case, are you not?

Mr. FitzGerald: Yes, it is an epileptic case if I recall, but I believe that man had seizures back at that time.

Mr. McNamara: No, they developed later.

The Court: This is an epileptic case, that is why I put it in there.

Mr. FitzGerald: I would like an exception also your Honor to that part of the charge "If you
792 find that employees refuse to employ him because he is too frequently sick, because he is unable to do a good day's work, because of the danger from such a workman, a workman who suddenly has faint spells, dizzy spells, epileptic fits or convulsions—" we say the jury must find that condition to be as of 1919.

The Court: I am bound by what the higher Courts have said.

Mr. FitzGerald: I want an exception your Honor. There is also an opinion in one of the Circuit Courts which states that even though the

disease had begun and was progressive, unless it had reached a point of total and permanent disability before the date of the expiration of the contract, there could be no recovery. It is admitted this is a progressive disease if it is true epilepsy. 793

The Court: That is just what I have told this jury in starting. You cannot expect me to repeat everything in every paragraph. (First paragraph in Charge read by the Court at this time.)

Mr. FitzGerald: Exception.

(The jury retires at 2:55 p. m.) 794

VERDICT.

In this cause the jury on their oath say that the defendant is liable in manner and form as the plaintiff in his declaration hath alleged and find for the plaintiff to recover from the defendant $57.50 a month from May 31, 1919 to March 31, 1932, inclusive, being 155 months and amounting to the sum of $8,912.50. 795

(Signed) DANIEL M. ST. GEORGE,
(3:53 p. m.) Foreman.

All of the exhibits mentioned in the foregoing testimony and received in evidence are hereby made a part of this Bill of Exceptions, except such as may be by stipulation omitted from the same.

796 And the defendant prays that this Bill of Exceptions may be allowed, settled and signed.

Settled and allowed this 26th day of July, 1932.

HARLAND B. HOWE,
Judge of the United States District
Court for the District of Vermont.

It is hereby agreed that the above and foregoing may be settled and allowed by the Court as the Bill of Exceptions in said cause.

797 .....
Attorney for Plaintiff.

Endorsed:
Filed July 27, 1932,
A. Myrl Blakely,
Deputy Clerk.

Plaintiff's Exhibit 1.

Apr. 19-1932 K. A. G.

Montgomery Ctr., Vt.
798 Dec. 7, 1920.

This is to certify that I have given medical treatment to Mr. Newton W. Lumbra, of this town, a veteran of the world war, since June 1920, and I find he suffers from *Rheumatism, Chronic Bronchitis and Nervousness.* All three conditions incapacitate Mr. Lumbra to a certain extent from doing his daily tasks. I believe these disabilities were brought on *by exposures to shell-shock,* poison-gas and inclement weather during his war services.

FRANK B. HUNT, M. D.

Defendant's Exhibit A.

4-19-1932. K. A. G. 799

SCHEME OF REPORTS OF PHYSICAL EXAMINATIONS.

Place St. Albans, Vermont.
Date Dec. 10, 1920.

1. Claimant's name Newton W. Lumbra (C512534.)

2. Service organization and rank July 13, 1917, April 29, 1919, 103 M. G. Bn. Pvt. 800

3. Present address Montgomery Center.

4. Age 28. Color White. Previous occupation Lumberman.

5. Brief military history of claimant's disability: "never sick in Army". Hospital once for sprained ankle in France. Became sick after getting home.

6. Present complaint: Rheumatism, throat trouble, "Husky voice."

7. Physical examination: 801

(General examination desired, but most detailed report of part which is the seat of disability. This report should give in detail all physical findings and in addition laboratory findings of sputum, urine, blood, etc., X-ray, blood pressure, etc., depending on the location of the disability.)

Young adult white male. Head contour normal, eyes, ear nose negative, chronic inflammatory process in larynx. Lungs negative

Defendant's Exhibit A.

802 to fercussia & auscultation. Fremitus O. K. No abnormalties in heart sounds noted no murmurs, reduplications or accentuations noted. Abdomen negative Lower extremities negative. Upper extremities negative.

8. Diagnosis: Articular Rheumatism chronic 1039. Lyarngitis chronic 666

9. Prognosis: Good.

10. Is claimant able to resume former occupation? Yes.

11. Do you advise it? Yes.

803 12. Is claimant bedridden? No

13. Is the claimant able to travel? Yes.

14. Do you advise hospital care? No

15. Will claimant accept hospital care? Yes.

16. Is there a reasonable presumption that the applicant has a disability due or traceable to his military service? Yes.

17. What is the degree of his vocational handicap resulting from the disability (major, minor, or negligible; see explanation on reverse)? Negligible.

804 18. Does his physical and mental condition render training feasible? (See explanation on reverse.) Yes.

Signature BYRON HERMAN, M. D.
Grade Examiner U. S. P. H. S.

Defendant's Exhibit B.

GLB H-223 805

UNITED STATES OF AMERICA.
WAR DEPARTMENT,
Washington, March 2, 1932.

I HEREBY CERTIFY *that* the documents hereto attached pertaining to Newton W. Lumbra, Army Serial Number 110,301, who enlisted July 14, 1917, for Company B, 1st Infantry, National Guard of Vermont, already in Federal service, served overseas from October 3, 1917, 806
to April 17, 1919, and was honorably discharged, in the grade of private, April 29, 1919, at Camp Devens, Massachusetts, are true photostatic copies of the report of examination for enlistment; the reports of examinations made prior to separation from service; one medical card; one field medical card; and one clinical record; the originals of which are on file in the Adjutant General's Office.

C. H. BRIDGES,
Major General, U. S. Army, 807
The Adjutant General.

I HEREBY CERTIFY that C. H. BRIDGES, who has read the foregoing certificate, is ~~the~~ The Adjutant General of the Army, and that to his certification as such full faith and credit are and ought to be given.

IN TESTIMONY WHEREOF I, PATRICK J. HURLEY, Secretary of War, have hereunto

Defendant's Exhibit B.

808 caused the Seal of the War Department to be affixed and my name to be subscribed by the Assistant ~~and~~ Chief Clerk of the said Department, at the City of Washington, this 3rd day of March, 1932.

PATRICK J. HURLEY,
Secretary of War.
By F. M. HOADLEY,
Assistant ~~and~~ Chief Clerk.

(Seal)
War Department.
809 Standard Form No. 13.

REPORT OF PHYSICAL EXAMINATION OF ENLISTED MAN PRIOR TO SEPARATION FROM SERVICE IN THE UNITED STATES ARMY

(Surname): Lumbra; (Christian name): Newton W.; (Army serial number): 110301.

(Grade): Pvt.; (Company, and regiment or
810 arm or corps or department): Co. B. 103 M. G Bn.

(Occupation prior to entry into service): Farmer.

DECLARATION OF SOLDIER

Question. Have you any reason to believe that at the present time you are suffering from the effects of any wound, injury, or disease, or that you have any disability or impairment of health, whether or not incurred in the military service?

Answer: No.

Defendant's Exhibit B.

Q. If so, describe the disability, stating the nature and location of the wound, injury, or disease. 811

A. .....V.....

Q. When was the disability incurred?

A. .....V.....

Q. Where was the disability incurred?

A. .....V.....

Q. State the circumstances, if known, under which the disability was incurred.

A. .....V.....

812

I declare that the foregoing questions and my answers thereto have been read over to me, and that I fully understand the questions, and that my replies to them are true in every respect and are correctly recorded.

NEWTON W. LUMBRA,
(Signature of soldier.)

Witness:
Jack B. Wood,
(Signature of witnessing officer.) 813
Capt. Co. B. 103 M. G. Bn.
(Rank and organizatoin.)

Place: Camp Devens, Mass.
Date: April 23, 1919.

Form No. 135-3, A. G. O.
Nov. 11, 1918.

Defendant's Exhibit B.

814 CERTIFICATE OF IMMEDIATE COMMANDING OFFICER

I CERTIFY THAT:

* Aside from his own statement I do not know, nor have I any reason to believe, that the soldier who made and signed the foregoing declaration has a wound, injury, or disease at the present time, whether or not incurred in the military service of the United States.

† injury, for disease, which was incurred about
815 ....., 191.., at .....

The nature and location of the † wound, † injury, † or disease, so far as known, are: .....
.....\.....

The circumstances under which incurred were .....
.....\.....

In my opinion the wound, injury, or disease \†did / †did not / originate in the line of duty in
816 the military service of the United States.

Remarks .....\.....

JACK B. WOOD,
Captain 103 M. G. B.,
Commanding Co. B.

Camp Devens, Mass. April 23, 1919.
(Place and date.)

* Strike out the part of the certificate not applicable to the case.

† Strike out words not applicable.

Defendant's Exhibit B.

CERTIFICATE OF EXAMINING SURGEON 817

I CERTIFY THAT:

The soldier named above has this date been given a careful physical examination, and it is found that

* He is physically and mentally sound.

* He is physically sound and with the following exceptions:

(Describe the nature and location of the defect, wound, injury, or disease.)

.....

818

The wound, injury, or disease († is X † is not) likely to result in death or disability.

In my opinion the wound, injury, or disease (†did †did not) originate in the line of duty in the military service of the United States.

In view of occupation he is 0 per cent disabled.

Remarks .....

819

MAJOR S. J. BLATT,
M. C., U. S. Army.

Camp Devens Ayer Mass. Apr 23 1919
(Place and date.)

* Strike out the part of the certificate not applicable to the case.

† Strike out words not applicable.

Defendant's Exhibit B.

820 REGISTER CARD

5723

(1) Surname. Lumbra
(2) Christian name Newton W
(3) Rank Pvt (4) Company B
(5) Regiment or staff corps 103d Mil Bn
(6) Age. Yrs. 26 (7) Race W
(8) Nativity Vt (9) Service. Yrs. 11 12
(10) Register No. 110301
821 (11) Date of Admission. June 18 18
(12) Source of admission. Base Hosp #116, AEF
(13) Cause of Admission. Sprain, battle, severe, left ankle. June 16 18. Incurred during bombardment, June 16, 1918.
Hosp. .....
(14) In Line of Duty? Yes
(15) Complication, sequ., etc. .....
(16) Disposition. C C APO #727.
822 (17) Date of Disposition July 19, 1918
(18) Name of Hospital, etc. BASE HOSPITAL No 9 A. E. F.
(19) Sent With Report of S. & W. for Month of ....., 1918
(20) From .....
(21) F. McU Capt. MeUSR U. S. ARMY
No.
(22) Of Disposition
No.
(23) Of Admission

Defendant's Exhibit B.

(24) Sub. No. .....

(25) Sub. No. .....

823

CLASSIFICATION

Form 52
Medical Dep't U. S. Army.
(Revised Oct. 17, 1910).

Space above this line to be left blank

824

(26) Days of Treatment in Current Case Current Year

Year, 1918	*In Quarters*	*In Hospital*
January		
February		
March		
April		
May		
June		13
July		18
August		
September		
October		
November		
December		
Total		31

825

Defendant's Exhibit B.

826 FIELD MEDICAL CARD.

Name (Block letters.) Lemmra Newton W.
Rank Pvt. No. 110301
Regiment or Staff Corps 103 M. G. Co. B.

Sick Wounded
Line of Duty Yes or No.
(Strike out descriptions which do not apply.)

Field Hosp. No. Evac. Hosp. No.
Dressing Sta. No. Camp Hosp. No.
Date of Admission
827 Morphia
Dose and Time
A. T. Serum
Dose and Date
Diagnosis Sprained left ankle S. while in action during bombardment June 16, 1918

Base Hospital No.
Diagnosis (if altered from above)

Base Hospital No.
Diagnosis (if altered from above)
828

Date of entry and medical unit receiving patient must be recorded immediately on admission. Brief clinical notes are to be added later and signed by M. O.

Base Hospital No. 116 A. E. F.
Date of Entry June 18 1918
June 23 X ray shows no evidence of fracture
Base Hospital No. Base Hospital No. 9 A. E. F.

Defendant's Exhibit B.

Date of Entry Jul 14 829

7/16/18 History of sprained ankle June 16, 1918 Good position Good motion.

This card must accompany the patient, attached to his clothing. It must not be destroyed. It will be transmitted with the patient if he is evacuated to the U. S. Temperature charts or additional clinical notes may be sent with this card in the same envelope.

5723 46

CLINICAL RECORD 830

Baker

110301

Hospital F. H. 101

Register No. 3942. Ward A-3.

Name Lumbra Newton W.

Rank Pvt. Co. B. Regt. or Staff Corps 103 M. G.

Age (years) 26 Race W. Service (years) 11/12.

Birthplace Vt.

Station A. E. F. 831

Date of admission June 17, 1918.

Source of admission F. H. 104

Religion Cath.

Home address Montgomery Centre, Vt.

Name and address of nearest relative Mother. Celia Lumbra same.

Initials of admitting officer M. A. C.

(To be filled in by ward surgeon when case is completed.)

Disposition Evac. S. O. S. Hosp.

Date June 18 1918

Defendant's Exhibit B.

832 Final diagnosis. Sprained left angle S while in action during bombardment June 16, 1918.
Condition on completion of case Improved.

JOHN W. [redacted]UCHMAN
Ward Surgeon.

CLINICAL RECORD

Family and Personal History

833 Occupation: Farmer.
Tropical service: no.
Habits as to alcohol: Beer once in while.
Family history: neg.
Previous personal history: never sick
Gunshot wounds or other casualties: no.
Venereal history: no.

CLINICAL RECORD

History of Present Disease

834 (Date and mode of onset; probable cause; evolution and course to admission.)
June 16, 1918 In morning after the bombardment was going into dugout, slipped and sprained ankle.

CLINICAL RECORD

Subjective Symptoms

Condition on admission: Great Pain in ankle. left.
Other side of left ankle quite swollen.

Defendant's Exhibit B.

CLINICAL RECORD

835

Objective Symptoms

Condition on admission: good.
Weight: Normal ; Present
General condition: Good
Special senses: ok.
Skin and mucous membranes: ok.
Glandular system: ok.
Vascular system: ok.
Blood pressure: V
Heart: normal
Lungs: normal
Genito-urinary system: ok.

836

CLINICAL RECORD

Objective Symptoms—Continued

Abdomen: ok.
Liver,
Spleen,
Tenderness,
Masses,
Nervous system: ok.
Osseous system: ok.
Muscles and joints: sprain left ankle
Diagnosis on transfer card: Sprain lt. ankle.
Diagnosis of ward surgeon:

837

Defendant's Exhibit B.

838 CLINICAL RECORD

RADIOGRAPHIC REPORT

Station Base 116. A. E. F.
Date June 20, 1918
From Ward 11—
To X-Ray.
Information requested: For fracture left ankle.
Clinical diagnosis:

839 Name illegible,
Major M. R. C.,
U. S. Army.

Laboratory X Ray.

June 23, 1918

X-ray findings: Radiographic examination shows no evidence of fracture

PLATE			
Number	*Size*	*Part*	*Disposition*
27	8-10	Ankle L	

840

WILLIAM S. GLENN, JR.,
Lieut. M. R. C.,
U. S. Army.

Surname of Patient	Christian Name
Lumbra	Newton.

Rank	Company	Regiment or Staff Corps
Pvt.	B.	103 M. G. Btn.

Defendant's Exhibit C.

CENTRAL VERMONT RAILWAY COMPANY. 841

Car Department, Northern Division.

Office of Mech. Supt. at St. Albans, Vt., Dec. 15th, 1924.

The following appointment is recommended:

Name in full: Newton W. Lumbra. Age 32.

Date of Appointment: December 12th, 1924.

Appointed To ... By Whom Recommended....

Occupation: Laborer.

Department: Freight Shop.

Station: St. Albans. 842

Salary or Wages * 35¢.

If an appointment to a new office, give particulars here.

If some one already in the service is to be succeeded, give her name and salary paid.

Succeeding K. A. Tatro, Laborer 35¢, reclassified temp.

Central Vermont Ry. Co.
Office of Time-keeper
#241
Dec. 18, 1924 843
St. Albans, Vt.

Approved
J. W. Wardlaw

B

H. F. NOWELL,
Signature of Officer Recommending.

*Give rate per month or per day.

SHOP

Defendant's Exhibit C.

844 CENTRAL VERMONT RAILWAY COMPANY.

Application for Employment.

Applicants for employment as SHOPMEN, LABORERS, &c., must fill up an application on this form.

No one need apply for employment who is NOT ABLE TO READ AND WRITE, is more than 50 years of age, and cannot produce a good character from his last employer.

Parties dismissed from the Service, or leaving
845 it for other employment to suit their own convenience are not to be re-employed.

N. B.—Testimonials are only accepted from respectable and well-known person, and in all cases their names, occupations and addresses must be given.

State your Christian and surname in full: Newton W. Lumbra.

State your age, and place and country of your birth: 32 Montgomery, 148

State what testimonials you have and attach
846 them hereto: .....√.....

Have you any physical defect, such as deafness or shortness of sight, rendering you unfitted for employment on a Railway: No.

State name and residence of your last employer, and attach a character from him on the form provided: .....

Have you ever been in the service before? If so, state reason for leaving: Eng. House, Sept. 1924. Resigned own accord.

Signature of Applicant

NEWTON W. LUMBRA.

Defendant's Exhibit C.

I have seen the applicant Newton W. Lumbra 847
and recommend him for employment at Frt Shop
as Laborer.

Date, ...19.

(Initials) (Initials)
Head of Dept.

CONDITION OF ADMISSION TO THE SERVICE

Applicants for positions in the shop service, 848
must be over 16 and under 50 years of age, they
must be able to read and write, be free from all
bodily complaints and of a strong constitution.
The Candidate must produce testimonials of
character from his last employer and also from
some person of responsibility and position by
whom he is personally known; these with the
nomination will be submitted, on the candidate
appearing for examination, and it will be decided
whether he be a proper person to be appointed.

No employee must quit the service without giv- 849
ing thirty days' notice in writing of his intention
to do so. In the event of his leaving without such
sanction, all claim for pay due him will be for-
feited.

Appointments are made on the distinct under-
standing, that the parties hold themselves in
readiness to proceed to duty immediately on be-
ing summoned, their pay being allowed from the
date of employment; and that they reside
wherever required.

Defendant's Exhibit D.

850 I, the undersigned, have read and hereby agree to the above conditions.

NEWTON W. LAMBRA.

K. A. Pamelee, Witness.

Defendant's Exhibit D.

CENTRAL VERMONT RAILWAY COMPANY.

MP Department, Northern Division.

851 Office of Mech. Supt. at St. Albans, Vt., July 12th, 1922.

The following appointment is recommended:

Name in full: Newton Lambra, Age 30.

Date of Appointment: July 12, 1922.

Appointed To . . . . By Whom Recommended.

Occupation: Mechanist Helper.

Department: Gang A.

Station: St. Albans.

Salary or Wages *: 47c.

If an appointment to a new office, give particu-

852 lars here.

If some one already in the service is to be succeeded, give here name and salary paid.

In place of strikers.

Central Vermont Ry. Co.
Office of Time-keeper
July 22 1922
St. Albans, Vt.

Approved
JWW

H. F. NOWELL,
Signature of Office Recommending.

*Give rate per month or per day.

Defendant's Exhibit D.

SHOP

852

CENTRAL VERMONT RAILWAY COMPANY.

Application for Employment.

Applicants for employment as SHOPMEN, LABORERS, &c., must fill up an application on this form.

No one need apply for employment who is NOT ABLE TO READ AND WRITE, is more than 50 years of age, and cannot produce a good character from his last employer.

Parties dismissed from the Service, or leaving it for other employment to suit their own convenience, are not to be re-employed. 851

N. B. Testimonials are only accepted from respectable and well known persons, and in all cases their names, occupations and addresses must be given.

State your Christian and surname in full: Newton Lumbra.

State your age, and place and country of your birth: 30. Montgomery.

State what testimonials you have and attach them hereto: None. 855

Have you any physical defect, such as deafness or shortness of sight, rendering you unfitted for employment on a Railway? None.

State name and residence of your last employer, and attach a character from him on the form provided: Nelson Hall & Co., Richford Vt.

Have you ever been in the service before? If so, state reason for leaving: No.

Signature of Applicant
NEWTON LUMBRA

Defendant's Exhibit D.

856 I have seen the applicant Newton Lumbra and recommend him for employment at St. Albans as Mach. Helper.

Date July 12th, 1922.

K. J. EDMUND
Head of Dept.

Clock #471
Mach. Hpr.
47 per hr.

(Initials)

857

CONDITION OF ADMISSION TO THE SERVICE.

Applicants for positions in the shop service must be over 16 and under 50 years of age, they must be able to read and write, be free from all bodily complaints and of a strong constitution. The Candidate must produce testimonials of character from his last employer and also from
858 some person of responsibility and position by whom he is personally known; these with the nomination will be submitted, on the candidate appearing for examination, and it will be decided whether he be a proper person to be appointed.

No employee must quit the service without giving thirty days' notice in writing of his intention to do so. In the event of his leaving without such sanction, all claim for pay due him will be forfeited.

Defendant's Exhibit E.

Appointments are made on the distinct understanding, that the parties hold themselves in readiness to proceed to duty immediately on being summoned, their pay being allowed from the date of employment; and that they reside wherever required.

I, the undersigned, have read and hereby agree to the above conditions.

NEWTON LUMBRA.

Wm. R. Simpson,
Witness.

Defendant's Exhibit E.

CENTRAL VERMONT RAILWAY COMPANY.

Car Department Northern Division.

Office of Mech. Supt. at St. Albans, Vt., February 20, 1924.

The following appointment is recommended:
Name in full Newton Wallace Lumbra #207
Age 31
Date of Appointment February 18, 1924.
Appointed To By Whom Recommended
Occupation Laborer
Department Freight Shop
Station St. Albans, Vt.,
Salary or Wages 35¢

If an appointment to a new office give particulars here. .....

Defendant's Exhibit E

802 If some one already in the service is to be succeeded, give here name and salary paid the employed succeeding them. F. Moulo, Laborer, 2nd has settled.

#207

H. F. NOWELL,
Signature of Officer Recommending

Approved
J. W. Wardlaw
H

803 Give rate per month or per day.

#207 SHOP

CENTRAL VERMONT RAILWAY COMPANY.

APPLICATION FOR EMPLOYMENT.

Applicants for employment as SHOPMEN, LABORERS, &c., must fill up an application on this form.

804 No one need apply for employment who is NOT ABLE TO READ AND WRITE, is more than 50 years of age, and cannot produce a good character from his last employer.

Parties dismissed from the Service, or leaving it for other employment to suit their own convenience, are not to be re-employed.

N. B. Testimonials are only accepted from respectable and well known persons, and in all cases their names, occupations and addresses must be given.

Defendant's Exhibit E.

State your Christian and surname in full. Newton Wallace Lambra 865

State your age, and place and country of your birth. Age 31 Born Montgomery, Vt.

State what testimonials you have and attach them hereto. V

Have you any physical defect, such as deafness or shortness of sight, rendering you unfitted for employment on a Railway? No.

State name and residence of your last employer, and attach a character from him on the form provided. Arnold Co. St. Albans. 866

Have you ever been in the service before? If so, state reason for leaving. Yes. M. P. Dept. Eng. House from July 1923 to May 1923. Left the service on my own record.

Signature of Applicant
NEWTON WALLACE LAMBRA

I have seen the applicant Newton W. Lambra and recommend him for employment at St. Albans as Laborer. 867

Date Feby. 18th, 1924.

ALF. SOUCIERE
(Initials H. F. N. 2/19) Head of Dept.

CONDITION OF ADMISSION TO THE SERVICE.

Applicants for positions in the shop service must be over 16 and under 50 years of age, they

Defendant's Exhibit E.

868 must be able to read and write, be free from all bodily complaints, and of a strong constitution. The Candidate must produce testimonials of character from his last employer and also from some person of responsibility and position by whom he is personally known; these with the nomination will be submitted, on the candidate appearing for examination, and it will be decided whether he be a proper person to be appointed.

869 No employee must quit the service without giving thirty days' notice in writing of his intention to do so. In the event of his leaving without such sanction, all claim for pay due him will be forfeited.

Appointments are made on the distinct understanding, that the parties hold themselves in readiness to proceed to duty immediately on being summoned, their pay being allowed from the date of employment; and that they reside wherever required.

870.

I, the undersigned, have read and hereby agree to the above conditions.

NEWTON WALLACE LUMBRA.

J. N. Daignault,
Witness.

Defendant's Exhibit F.

File No. C 512 534. 871

APPLICATION OF PERSON DISABLED IN AND DISCHARGED FROM SERVICE.

1. Full name (Given name.) Newton (Middle name.) Wallace (Last name.) Lumbra
2. Address (Number.) .... (Street.) .... (City or town.) Montgomery Centre (State.) Vermont.
3. Under what name did you serve? As Stated Above (a) Serial No. 110,301 872
4. Color White Date of birth April 17-1892 Place of birth Montgomery, Vt.
5. Make a cross (X) after branches of service you served in:
   General Service .... Limited Service .... Army X Navy .... Marine Corps .... Coast Guard ....
6. Date you last entered service July 14, 1917 Place of entry Fort Ethan Allen
7. Rank or rating at time of discharge Private 873
8. Company and regiment or organization, vessel, or station in which or on which you last served Co. B.—103" Machine Gun Battallion
8a. Give fully any other service in the military or naval forces, stating rank and organization None Other
9. Date and place of last discharge Camp Devens, April 29", 1919.
10. Cause of discharge Mustered Out. No further service required.

Defendant's Exhibit F.

874 11. Nature and extent of disability claimed Bronchial Troubles, Rheumatism, Nervousness

12. Date disability began Began to manifest itself about one year ago.

13. Cause of disability Foreign Service, Gas and Exposure.

14. When and where received In France.

15. Did you receive treatment at an Army or Navy hospital? Yes (a) If so, state name and location of the hospital Base

875 Hospital, #116. Place Unknown

16. Occupations and wages before entering service: Farming. #40.00 and ~~Kept.~~ board and washings.

17. Last two employers before entering service: (Employer's name.) Albert C. Lambra (Address.) Fairfield, Vt. (Time employed.) One Month

(Employer's name.) E. E. Touchette (Address.) Montgomery Ctr., Vt. (Time employed.) Two months

876 18. Occupation since discharge, dates of each, and wages received. If less than before, why? (Occupation.) Laborer in Factory (Commencing date.) July, 1919 (Ending date.) Jan. 1", 1921 (Monthly wages.) $3.00 per. diem

(Occupation.) ~~E. E. Touchette~~ Farming (Commencing date.) Jan. 11", 1921 (Ending date.) ..... (Monthly wages.) $2.50 p. d. board

19. Present employer (Full name.) .....
(Address.) .....

Defendant's Exhibit F.

29. Name and address of attending physician F. B. Hunt Montgomery Ctr., Vt. 877
21. Are you confined to bed? No Do you require constant nursing or attendance? No
22. Name and address of nurse or attendant None
23. Are you willing to accept medical or surgical treatment if furnished? Yes.
24. Are you single, married, widowed, or divorced? Married.
25. Times married Once
26. Date and place of last marriage May. 17, 1920 878
27. Times present wife has been married Once.
28. Maiden name of wife Hazel Anna Lavalla
28a. Do you live together? Yes
29. Date of wife's birth (Day) Dec. 22nd, 1902 (Month.) ..... (Year.) .....
30. Have you now living a child or children, including a stepchild, adopted child, or an illegitimate child, under eighteen years of age and unmarried? No.
31. If so, state below full name of each child and date of birth; if a stepchild or adopted child, so state, and give date stepchild became a member of your household or date adopted child was adopted by you. 879
32. Have you a child of any age who is insane, idiotic, or otherwise permanently helpless? No
33. Give name and address of each parent living None Living
34. Age of mother .... Age of father ....

Defendant's Exhibit F.

880 35. (a) Is your mother now dependent on you for support? .....
(b) Is your father now dependent on you for support? .....
(c) If so, give your average monthly contribution to your mother, $ ....; your father, $ ....

36. (a) Value of all property owned by your mother, $ ....; your father, $ ....
(b) What is the monthly income of your mother, $ ....; your father, $ ....

881 37. Did you make an allotment of your pay? Yes.

38. If so, to whom? Celia Hattie Lumbra, my mother, now dead.

39. Give number of any other claim filed on account of this disability and place where filed 512,534 Washington, D. C.

40. Did you ever apply for War Risk Insurance? Yes (a) When and where? Camp Bartlett Sept., 1917. (b) Insurance certificate number 2004073

882 41. Name of beneficiary Celia Hattie Lumbra.

I make the foregoing statements as a part of my claim with full knowledge of the penalty provided for making a false statement as to a material fact in a claim for compensation or insurance.

NEWTON W. LUMBRA
(Signature of claimant.)

Subscribed and sworn to before me this 17 day of January 1921, by Newton W. Lumbra, claim-

Defendant's Exhibit G.

ant, to whom the statements herein were fully made known and explained. 882

P. H. COLEMAN,
Notary Public.

We, the undersigned, severally solemnly swear that we have known the claimant whose name is subscribed above twenty years, and that we have read the statements made by him, and the facts stated are true to the best of our knowledge and belief.

Leon. Dunn Montgomery Center, Vt. 884
H. H. Tracy Montgomery Center, Vt.
(Signature of witness.) (Address of witness.)

Subscribed and sworn to before me this 17 day of January, 1921.

P. H. COLEMAN,
Notary Public.

Defendant's Exhibit G.

APPLICATION OF VETERAN DISABLED IN THE WORLD WAR FOR COMPENSATION AND VOCATIONAL TRAINING 885

APPLICATION FOR COMPENSATION AND VOCATIONAL TRAINING

A. PERSONAL HISTORY.

1. Full name (Last Name.) Lumbra (First Name.) Newton Wallace
2. Address (Number.) .... (Street.) ..... (City or Town.) Richford (State.) Vermont.

Defendant's Exhibit G.

886 3. Under what name did you serve? Newton W. Lambra.

4. Color White Date of birth April 17th, 1892 Place of birth Montgomery Ctr., Vt.

B. MILITARY EXPERIENCE AND RELATED INFORMATION.

5. Make a cross (X) after branches of service you served in:
General Service .... Limited Service .... Army X Navy .... Marine Corps .... Coast Guard .... (a) Give Serial
887 No. 110301

6. Date you last entered service July 14th, 1917 Place of entry Fort Ethan Allen Vt.

7. Date of last discharge April 29, 1919 Place of discharge Camp Devens Mass.

8. Company and regiment or organization, vessel on which, or station in which, you *last* served Co. B 103 Machine Gun Bn.

9. Rank or rating at time of discharge Private

10. Nature of discharge: Honorable yes;
888 Ordinary ....; Dishonorable ....; Bad conduct ....; S. C. D. ....

11. Nature of disability claimed Lungs & Throat Degree of disability Partial.

12. Date disability began year ago

13. Cause of disability gas

14. Where received Toul Sector

15. Did you receive treatment at an Army or Navy Hospital, or any other hospital? No (a) If so, state name and location of the hospital and dates of treatment .....

Defendant's Exhibit C.

16. If the injury was caused through the fault of some person other than the United States or the enemy, state whether suit has been commenced against, or settlement made with such person on account of such injury: 889
If settlement has been made or damages recovered state which, and the amount: ....

C. OCCUPATIONAL EXPERIENCE.

17. What was your principal occupation or trade before entering the service?
(Occupation.) Mill work (Monthly wages.) 40 dollars. (Date.) July 14th, 1916. 890

18. Give any other occupation or trade in which you were engaged:

19. Last two employers before entering the service:
(Employer's name.) Nelsen Hall Co. (Address.) Montgomery Ctr. (Time employed.) 1 year
(Employer's name.) Nelson Hall Co. (Address.) Montgomery Ctr. (Time employed.) Previous 891

20. Occupation since discharge, dates of each, and wages received. If less than before, why? (Occupation.) Mill (Commencing date) July, 1919 (Ending date) Still working (Monthly wages) 40.

21. Present employer (Full name.) .....
(Address.) .....

D. EDUCATIONAL HISTORY.

22. How far did you go in grade school? 9th grade. In high school? No

Defendant's Exhibit G.

892 23. What other schooling have you had, such as college, Army or Navy school, night school, correspondence school, etc. (Answer fully.) None

E. MEDICAL DATA.

24. Name and address of physicians who have since discharge attended you for your disability None

25. Are you confined to bed? No. Do you require constant nursing or attendant? No.

893 26. Name and address of nurse or attendant .....

27. Are you willing to accept medical or surgical treatment if furnished? Yes.

F. FAMILY OBLIGATIONS AND DEPENDENCY CLAIMS.

28. Are you single, married, widowed, or divorced? Widowed.

29. Times married Once. Date and place of last marriage May 17th, 1920.

30. Times present wife has been married Once.

31. Do you live together? Dead (a) If not, 894 state why you are not living together, and your wife's present address .....

32. Give below the information required concerning each dependent child under 18 years of age and unmarried.

Name of Child: Ada Hazel Lumbra Date of birth Day 24 Month 3 Year 1921 Name and Address of Person with Whom Child Lives: Frank Lavella, Montgomery Ctr., Vt.

33. If any child mentioned in question 32 is an adopted child, give name of such child and date of adoption .....

Defendant's Exhibit G.

If a stepchild, give name and date such child became a member of your household .....

895

34. Have you a child of any age who is insane, idiotic, or otherwise permanently helpless? No. If so, give name and age .....

35. Give name and address of each parent living Both dead.

36. Age of mother .... years.

37. Age of father .... years.

38. (a) Is your mother now dependent on you for support? .....

(b) Is your father now dependent on you for support? .....

896

39. If compensation is claimed on behalf of either parent, or both, answer the following questions:

(a) Are they living together? .....

(b) Widowed or divorced? .....

(c) Are they incapable of self support? (Yes or no) .....

(d) If so, how is each incapacitated?

Mother .....

Father .....

897

(e) The average monthly contribution you gave to your mother, $..; your father, $....

(f) Value of all property owned by your mother, $....; your father, $:...

(g) What is the monthly amount of money received by your mother from all sources, $....; your father $....

40. If you claim disability of father, a physician's certificate must be attached hereto

Defendant's Exhibit G.

898 showing to just what extent he is incapacitated.

41. Give the following information concerning *all* of your brothers and sisters. If you have none, write "None" in blank space below.

Name	*Age*	*Residence*	*Married.*	*Occupation*	*Annual Income*
William Lumbra		Montgomery	Yes	Farmer	don't know
Albert C. Lumbra		East Fairfield	"	"	"
Freemont "		Montgomery	"	Mill work	"
Walter "		"	"	Farmer	"
899 Jay T. Lumbra		"	"	Truck Driver	"
Lillian Brooks		North Troy, Vt.	"	Housewife	"
Mrs. Bettie Foote		Montgomery	"	"	"
Mrs. W. M. Downey		East Highgate, Vt.	"	"	"
Mrs. Iva Touchette		Montgomery	"	"	"
Mrs. Joe Kemnette		"	"	"	"

G. MISCELLANEOUS INFORMATION

42. Did you make an allotment of your pay while in the service? Yes.

43. If so, to whom? Mother.

900

44. Give number of any other compensation claim filed on account of this disability and place where filed No.

45. Did you ever apply for War Risk Insurance? Yes (a) When? In service (b) Where? Camp Bartlett Mass. (c) Amount? 10,000.

46. Name of beneficiary in application for insurance. Mrs. Celia Lumbra.

47. Have you since changed the beneficiary to some other person? No.

(a) If so, to whom? .....

48. Have you ever previously applied for vocational training? No.

Defendant's Exhibit G.

Give facts briefly 901

49. Do you wish vocational training? Yes.

I make the foregoing statements as a part of this applicat on with full knowledge of the penalty provided for making a false statement as to a material fact in a claim for compensation, insurance, or vocational training.

NEWTON W. LUMBRA.
(Signature of claimant.)

Subscribed and sworn to before me this 21 day of Mar., 1922, by Newton Lumbra, claimant, to whom the statements herein were fully made known and explained. 902

S. CARL CARPENTER,
(Seal) Notary Public.

We, the undersigned, severally solemnly swear that we have known the claimant whose name is subscribed above 29 years, and that we have read the statements made by him, and the facts stated are true to the best of our knowledge and belief. 903

Ernest R. Lagrue	Richford, Vermont.
(Signature of witness.)	(Address of witness.)
Merle C. Lumbra	Richford, Vt.
(Signature of witness.)	(Address of witness.)

Subscribed and sworn to before me this 21 day of Mar., 1922.

S. CARL CARPENTER,
(Seal) Notary Public.

Petition for Appeal.

904 UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT.

NEWTON W. LUMBRA, vs. UNITED STATES OF AMERICA.	Law No. 816.

To the Honorable, the United States District Court in and for the District of Vermont:

The above named defendant, United States of America, believing itself aggrieved by the judg-
905 ment made and entered herein on the twenty-eighth day of April, 1932, in favor of the plaintiff against the defendant, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Second Circuit; for the reasons specified in the Assignment of Errors filed herewith, and it prays that this appeal may be allowed and a citation issue directed to the plaintiff, Newton W. Lumbra, commanding him to appear before said Appellate Court to do and re-
906 ceive what may pertain to justice in the premises, and it further prays that a transcript of the record proceedings and papers in this cause, duly authenticated, upon which said judgment is based, may be transmitted with this appeal to the said Circuit Court of Appeals pursuant to the rules and statutes as in such cases made and provided.

UNITED STATES OF AMERICA.
By HARRY B. AMEY,
United States Attorney.
ALLEN MARTIN,
Assistant United States Attorney.
WM. J. HESSION,
Chief Attorney, Veterans' Administration.

Approved: 907
July 27, 1932.
Harland B. Howe,
D. J.

Filed July 27, 1932,
A. Myrl Blakely,
Deputy Clerk.

Assignment of Errors.

UNITED STATES DISTRICT COURT 908
FOR THE DISTRICT OF VERMONT.

NEWTON W. LUMBRA, vs. UNITED STATES OF AMERICA.	Law No. 816.

Now comes the defendant, the United States of America, by its attorneys, Harry B. Amey, United States Attorney, Allen Martin, Assistant 909
United States Attorney, and William J. Hession, Chief Attorney, Veterans' Administration, and in connection with its appeal assigns the following errors, which Appellant avers occurred on the trial of said cause and on which it relies to reverse the judgment therein, as appears of record.

1. The Court erred in denying defendant's motion for a directed verdict at the close of all the evidence in the case. The motion was urged upon the court in substance as follows:

910 "Mr. Fitzgerald: At this time I would like to file a Motion for a Directed Verdict.

The Court: Have you any evidence in rebuttal?

Mr. McNamara: No.

The Court: Read it.

Mr. Fitzgerald:

'UNITED STATES DISTRICT COURT.

DISTRICT OF VERMONT.

911

NEWTON W. LUMBRA,
vs.
UNITED STATES OF AMERICA. } No. 816.

MOTION FOR DIRECTED VERDICT.

Now comes the defendant in the above entitled action at the close of all the evidence and moves for a directed verdict in its favor on the ground that upon all the law and the

912 evidence in this case the plaintiff is not entitled to recover for the reason that the plaintiff has not proved he was permanently and totally disabled on or before May 31, 1919, and that the evidence introduced in the case is insufficient to support a finding that the plaintiff was permanently and totally disabled on or before the 31st day of May, 1919.

HARRY B. AMEY,
U. S. Atty. for the District of Vermont.
By FRANCIS J. FITZGERALD,
Assistant Insurance Attorney."

The Court: You make that 31 and I make it the 29th. 913

Mr. Fitzgerald: The war risk insurance was paid for the month and even though he were discharged on the 29th, it would have been paid for the rest of April, and he would have 31 days grace, which would be May 31st.

The Court: I think this is a case to be decided by the jury. It is not for the Court. There's evidence here from which the jury can well find he was permanently and totally disabled on the 31st day of May, 1919, and that 914
being so, it is the plain duty of the Court to submit the case to the jury.

Mr. Fitzgerald: Exception?

The Court: Exception, yes.

Mr. Fitzgerald: The defendant rests.

2. The Court erred in excluding evidence of the defendant as to whether or not plaintiff "was a drinking man." The defendant alleges it had the right to show the extent to which plaintiff was addicted to the use of alcohol under the theory 915
that such usage might have been the cause of said epileptic seizures, and that it was error for the Court to rule that before the introduction of such evidence the defendant must first show that alcohol was a probable cause and not merely a possible cause of epilepsy.

"Q. Do you know whether or not Mr. Lumbra was a drinking man and how do you know?

Mr. McNamara: I object to that.

916 The Court: We haven't had any doctors testify that this man's condition is due to the use of alcohol.

Mr. Fitzgerald: They all testified it might be.

The Court: But none said there is any probability to believe it is true in this case.

Mr. Fitzgerald: They all said there's a number of causes.

The Court: I think to be perfectly fair in this case, that the Government should first
917 show that his condition is due to the use of alcohol, or there's some reasonable probability of it having affected it. Instead of turning the trial into a trial of the man's character and habits, we should try his case, it seems to me.

Mr. Fitzgerald: We are offering this testimony, your Honor, for three purposes:—credibility,—to show loss of time from work, and to show the possible cause of his condition.

918 The Court: But you haven't put in any evidence that tends in the least to show his epileptic fits are due to his use of alcohol. Now it is true, of course, that you asked the Doctor if such a thing is possible. Why yes,—it is possible. It is possible you will fall down tonight when you go to your hotel and kill yourself, but not probable. Now if you really want to try the case, you should try to show there's some reasonable ground that the use of alcohol caused his condition,—

is the cause of his fits. Now there isn't any 919
evidence to that effect here. The evidence on the other hand is that this is a functional disturbance; the evidence is he injured his brain at the time of the shell explosion, and when he became unconscious. If you have any evidence or are going to produce any to tend to show his fits are caused by the use of intoxicating liquor, you should put that in first.

Mr. Fitzgerald: If the Court please, all the medical testimony here has been that epi- 920
lepsy may be caused by many things. Dr. Skeels is the only one who stated it was his firm conviction it was caused by his injury in France, and we hope to show there was no injury received in France.

The Court: Why not start the trial in that way?

Mr. Fitzgerald: This particular witness wants to get home.

The Court: It would be better for his wants to go unsatisfied rather than to do a 921
wrong to this plaintiff.

Mr. Fitzgerald: We wouldn't do any wrong to the plaintiff intentionally.

The Court: It wouldn't help him any whether done unintentionally. I have a very clear recollection of the trial.

Mr. Fitzgerald: May I have an exception to your Honor's ruling?

The Court: Yes. I am just postponing this. Put in your other evidence first. The Court isn't willing to turn this into a trial of the soldier's habits in life. The question is:

922 Is he incapacitated and enfitled to his insurance?—not whether he becomes intoxicated, —unless there's some evidence here that the use of intoxicating liquor is the cause of his disability.

Mr. Fitzgerald: Your Honor, there's evidence it may be the cause.

The Court: That is way from the real issue. It may be a great many causes of his condition; a great many possible causes. Now I won't exclude your evidence. I just
923 say you postpone this evidence and see what your evidence is going to be as to whether his condition is caused by the use of intoxicating liquor. I won't exclude it now, but I just ask you to postpone that part of your case, notwithstanding your witness' necessity to get home. That is unimportant.

Mr. Fitzgerald: If the Court please, it will be impossible to attribute alcohol as being the cause without showing the use of it.

The Court: No, you have this man's con-
921 dition here—all his symptoms,—you have his career,—now is there any professional man—that would be an expert question,—who will say his condition may have been caused by the use of intoxicating liquor? Another thing about that he did not have this disturbance before this explosion in France, but he did right after that, in mild form, and they have been increasing and more severe. I will ask you to postpone this part of your case until after we see what the other doctors are going to say about this.

Mr. Fitzgerald: I don't think it would be 925
fair to ask doctors to say this was the cause; the possible or probable causes are too numerous.

The Court: I think it would be very fair, and I think it would be very unfair without asking a doctor first that question.

Mr. Fitzgerald: If alcohol is the cause of this man's condition?

The Court: Yes.

Mr. Fitzgerald: Your Honor, no doctor could say it. The doctors who have already 926
been on the stand have said it is a possibility. Whether it is a probability or not is for the jury to decide.

The Court: I shall not submit it to them to decide unless there's some evidence to support it. That is fundamental for hundreds of years.

Mr. Fitzgerald: I am trying to put in that evidence to support that hypothesis—that is the cause.

The Court: You just said you don't ex- 927
pect any doctor to testify to that, and it certainly is an expert question. If a doctor cannot give an opinion on it, it is the plain duty of the Court not to let the jury decide the question, because it would be on a mere guess. No question can be submitted to the jury to decide that there isn't any evidence to support.

Mr. Fitzgerald: I submit there's evidence in there that there's a possibility that is the cause.

928 The Court: It should not be submitted to the jury if it is a possibility. It has to be a probability.

Mr. Fitzgerald: It is being offered your Honor to show loss of work.

The Court: You say the use of intoxicating liquor has a bearing on a person's credibility, and I will pause here to have you bring me some law on that question.

Mr. Fitzgerald: I wish to apologize. I was mistaken. I meant his conviction would
929 be admissible.

The Court: On that question you are right. His conviction would be but not as a bearing on the cause of his disease.

Mr. Fitzgerald: It may be also offered to show probable or possible loss of time from work. This man has stated his broken employment; worked and was off; may the jury not consider the fact that that might have been caused by things other than epilepsy?

The Court: Yes, of course, it may. A man
930 may go hunting and lose some time, or go fishing and lose some time, or be sick and lose some time, or go to the circus and lose some time. If you can show he was drunk and lost time, not because of his health, I will admit it for that purpose,—because he was drunk,—not because of ill-health; that is admissible.

Mr. Fitzgerald: All right your Honor.

The Court: That must be shown, of course, at the time he lost the time. A man is entitled

to his insurance even if he does take a drink 931
or becomes intoxicated. The Government made a contract with this plaintiff by which it agreed to insure him and didn't put into it that if he got intoxicated it would become void. We should be very careful here to try this man's case on his policy,—his insurance that he bought from the Government, and not on his habits. No matter what kind of a man he is, he is entitled to his insurance, if he's drunk all the time, unless his drunkenness is the reason for his ill-health. Have I made 932
that clear to you gentlemen? A man steps up to the Government and buys his insurance policy of them, or the Metropolitan Insurance Co. and buys a policy of them, and sues them—why it isn't a defense that they can interpose against paying the insurance because the man got drunk on one or more, or on all occasions unless his drunkenness has caused his disability. Now in this case, if this plaintiff, this soldier boy, was disabled while he was in the war, he is entitled to his 933
insurance, if he's been drunk all the time ever since his discharge, unless the fact is that he was not disabled by reason of his service in the war but has become disabled by reason of his drunkenness since the war. Have I made that clear to you? Now as I said yesterday, we should try this man's case and try the Government's case and decide it and decide it right. It is the duty of the Court not to submit any question to the jury to de-

934 cide unless there's some evidence to support these questions. Whether there's any evidence in the case to support a given question is a question of law for me to decide, but if there's evidence to support a question, then it is a question for you to decide.

Mr. Fitzgerald: I submit there's some evidence in there—all of the doctors have given that as a possibility.

The Court: We will stop here and let you consult the books and show me some law to
935 that effect. It hasn't been written in the books yet so far as I have had occasion to look at them, but on the contrary, the rule is just the reverse. Unless there's some evidence in the case more than a possibility—unless there's some evidence tending to show probability the fact is so, then it is not a question for the jury to decide. Now that has been the law for a good many hundred of years. Now on your question that his drunkenness is the reason he did not work more, we leave
936 that open for you but it must be connected he did not work on certain such occasions because drunk,—but the evidence must be strong and convincing enough to show such continual intoxication—to show the inference is he could not work because intoxicated."

3. The Court erred in that part of its charge when it said "Did he go into the War a sound man in health and come out a ruined man in

health, so that he could not work continuously at 937
a gainful occupation, notwithstanding neither he nor his physician were aware of his affliction until much later?"

"Mr. Fitzgerald: Yes, if the Court please, I would like an exception to that part of the Charge which states he would be totally and permanently disabled when neither he nor his physician knew it. A man would be the best judge of his own condition.

The Court: Have you any law to that effect? I don't want to hear any argument 938
about it.

Mr. Fitzgerald: It is the evidence in this case. We object to that point because doctors have testified that men with epilepsy could work without endangering their health.

The Court: One doctor did; two or three others testified it would.

Mr. Fitzgerald: The testimony in here has been by doctors that persons with epilepsy don't endanger their health by working.

The Court: The exception was to what 939
I said 'when neither he nor his physicians were aware of his affliction until later'. I stated the law as the higher Courts have stated it and unless you have something later?

Mr. Fitzgerald: The only statement I wish to make is what I have made. May I have an exception?

The Court: You say because certain doctors testified here that persons who were ner-

940 vous could work without injuring themselves, that I should not charge the law of the land?

Mr. Fitzgerald: I don't think that Charge fits this case, and that is why I am asking for an exception.

The Court: I am asking you,—not what you think about it,—I said the higher Courts have decided that the law is just as I have stated it and unless there's some decision that I haven't seen,—and if you have a de-
941 cision to that effect, why I will be glad to have you tell me where it is, so I can look at it and correct my Charge.

Mr. Fitzgerald: If I had a citation on it I would have furnished it to you. I am merely asking an exception on it your Honor.

The Court: You say you haven't any case?

Mr. Fitzgerald: Not in hand at this moment.

The Court: Very well, take your exception; because if you do know of a case, you
942 should tell me about it so I can change my Charge."

4. The Court erred when in its charge it said "A good test or illustration of total disability is: Has his service in the war or injuries which he received by the explosion, compelled him to drop out of the ranks of the workers of the world and stand by the side of the road and watch the world go by? A good test,—an accurate illustration of total and permanent disability,—that has been written into the books by the higher Court."

"Mr. Fitzgerald: I would like an exception also your Honor to that part of the Charge—'Has his service in the war or injuries which he received by the explosion, compelled him to drop out of the ranks of the workers of the world and stand by the side of the road and watch the world go by?' You must find that condition prevailed on or before May 31, 1919; not what may have happened subsequently. 943

The Court: That is taken from the Circuit Court's opinion word for word. 944

Mr. Fitzgerald: I am familiar with that opinion. May I have an exception.

The Court: Certainly. You don't have to get it from me. I haven't anything to say about it."

5. The Court erred when it charged "If employers won't hire him after they learn of his actual condition—because of that condition,—he is totally disabled within the meaning of the law, notwithstanding he is physically able to do many kinds of manual work." 945

"Mr. Fitzgerald: I would like an exception also your Honor to that part of the Charge 'If employers won't hire him after they learn of his actual condition';—they must find that condition prevailed in 1919.

The Court: That language is taken from the Circuit Court opinion too, word for word.

Mr. Fitzgerald: Exception.

The Court: If you have anything later

946 that changes that, you ought to tell me about it. Have you?

Mr. Fitzgerald: I have no citation your Honor.

The Court: You are familiar with the case in which that was held, of course? If employers won't hire him—you are familiar with that case, are you not?

Mr. Fitzgerald: Yes, it is an epileptic case if I recall, but I believe that man had seizures back at that time.

947 Mr. McNamara: No, they developed later.

The Court: This is an epileptic case, that is why I put it in there."

6. The Court erred when it charged "The Government contends that the plaintiff is physically and mentally able to work at a gainful occupation a large part of the time, but if you find that employers refuse to employ him because he is too frequently sick,—because he is unable to do a good day's work,—because of the danger 948 from such a workman,—a workman who suddenly has faint spells, dizzy spells, epileptic fits or convulsions,—then he is totally disabled."

"Mr. Fitzgerald: I would like an exception also your Honor to that part of the Charge—'If you find that employers refuse to employ him because he is too frequently sick,—because he is unable to do a good day's work, because of the danger from such a workman,—a workman who suddenly has faint spells, dizzy spells, epileptic fits or con-

vulsions—' we say the jury must find that 949
condition to be as of 1919.

The Court: I am bound by what the Higher Courts have said.

Mr. Fitzgerald: I want an exception your Honor. There is also an opinion in one of the Circuit Courts which states that even though the disease had begun and was progressive, unless it had reached a point of total and permanent disability before the date of the expiration of the contract, there could be no recovery. It is admitted this is 950
a progressive disease if it is true epilepsy.

The Court: That is just what I have told this jury in starting. You cannot expect me to repeat everything in every paragraph. (First paragraph in Charge read by the Court at this time.)

Mr. Fitzgerald: Exception."

WHEREFORE, the defendant prays that judgment of the District Court for the District of Vermont may be reversed. 951

UNITED STATES OF AMERICA,
By HARRY B. AMEY,
United States Attorney.

ALLEN MARTIN,
Assistant United States Attorney.

WM. J. HESSION,
Chief Attorney, Veterans' Administration.

Endorsed:
Filed July 27, 1932,
A. Byrl Blakely,
Deputy Clerk.

Citation.

952 UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT.

NEWTON W. LUMBRA,
vs.
UNITED STATES OF AMERICA. } Law No. 816.

The President of the United States of America to Newton W. Lumbra, Greeting:

You are hereby cited and admonished to be and
953 appear at a session of the United States Circuit Court of Appeals for the Second Circuit, to be holden in the Borough of Manhattan, in the City of New York, in the State of New York, on the 24th day of August, 1932, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the District of Vermont, wherein the United States of America is appellant, and you are Appellee, to show cause, if any there may be, why the judgment against the said Appellant as in the said appeal mentioned, should
954 not be corrected, and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the City of Burlington, in the State and District of Vermont, within said Circuit, this 27th day of July in the year of our Lord, One Thousand Nine Hundred Thirty-two and of the Independence of the United States of America, the One Hundred Fifty-sixth year.

HARLAND B. HOWE,
Judge of the District Court of the
United States for the District of Vermont.

Acceptance of Service.

Endorsed: Returned with service accepted, August 2, 1932. 955

A. MYRL BLAKELY,
Deputy Clerk.

Acceptance of Service.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT.

NEWTON W. LUMBRA,
vs.
UNITED STATES OF AMERICA. } Law No. 816. 956

Receipt of a copy of the Assignment of Errors, Petition for Appeal, and Citation in the above case, which in the Circuit Court of Appeals will be entitled United States of America, Appellant (defendant below) vs. Newton W. Lumbra, Appellee (plaintiff below), is hereby acknowledged and service of the same is hereby acknowledged and all other and further service and formalities of service and notice are hereby waived. 957

Dated at Burlington, Vermont, July , 1932.

NEWTON W. LUMBRA,
by J. A. McNamara,
his attorney.

Filed August 2, 1932,
A. Myrl Blakely,
Deputy Clerk.

Supplemental Assignment of Errors.

958 UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT.

NEWTON W. LUMBRA, vs. UNITED STATES OF AMERICA.	Law No. 816.

Now comes the defendant, the United States of America, by its attorneys, Harry B. Amey, 959 United States Attorney, Allen Martin, Assistant United States Attorney, and William J. Hession, Chief Attorney Veterans' Administration, and in connection with its appeal assigns the following additional errors, which Appellant avers occurred on the trial of said cause, and on which it relies to reverse the judgment therein, as appears of record.

1. The Court erred in admitting evidence against the objection and exception of the de- 960 fendant, in the testimony of Walter E. Bell, relating to a bombardment on the Western Front, as follows:

Q. Was it a pretty general shelling you got there that morning?

A. Yes, it was.

Q. Did you see the effect of this bombardment on some of the men,—just what happened to them?

A. Yes.

Q. Describe that to the jury.

Mr. Fitzgerald: I object to him describing 961
anything that does not relate to Mr. Lumbra, as being immaterial and irrelevant.

The Court: Why not, to show its severity or mildness?

Mr. Fitzgerald: It might have killed twenty-five men and not affect Mr. Lumbra.

The Court: As showing the severity,—whether much or little,—powerful or mild.

Mr. McNamara: It is our contention this shell did not strike him, nor any fragment, but shells exploding that way had a peculiar 962
action in causing a curious concussion. Some men were decapitated entirely,—blown to pieces, although nothing hit them. This man was there and saw this happen.

Mr. Fitzgerald: Exception?

The Court: Yes.

Mr. McNamara: This, of course, will be in connection with the plaintiff's testimony he was thrown forty feet, as to whether or not that is probably so;—corroborating that fact. 963

Q. Go on and describe to the jury the bombardment and the concussion effect of these shells.

A. Well on leaving the dugout entrance—directly after we come in we got notice we have got to go back,—the minute we left the dugout this particular morning, as we start for our positions that were our positions in the trenches a few hours previous, we find on leaving the dugout we are all in the midst

9964 of the bombardment and we have got to take our best course to get to what I call our positions. We have got to get in there and set up another gun to prohibit the enemy from coming, and on the way over to the position I was travelling with another soldier from this same territory and several others from a different territory, and in trying to get at the position that is the most serious, on the way over we deliberately get throwed or pushed down several times with this terrible
9965 force of the shells breaking. If the shells break close to you they will take your life without possibly any notice whatsoever to you. Shells that whistle by you, you have no fear of; you can hear them and know about where they will land from you. Other shells that strike within twenty five or thirty feet from you will push you and throw you from the force of the shell but might never injure you,—which we have all had that occasion,
9966 —us fellows that have been there, to be throwed.

Q. How far did they throw you?

A. Several feet; twenty-five or thirty feet, and still not hurt you. If they're still further away they might tear you up from the fragments of the shell. They break in an arch form, and if you are in the halfway distance of the arch, you will feel just the concussion, which in my own instance I have been several times forced deliberately on my face, and with my eyes closed as hard as I

could close them, still see the flash and still be uninjured. If you were further away you would be torn from the fragments of the shell. These boys that went with me this particular morning,—we have one,—I don't see him here but he could be brought here,—and he was covered up completely,—just his head remained above the trench, from one of the shells breaking. His head was above the trench. There was no harm done to him but the concussion caved the trench in on him. We remained in this position and had to stay there in my particular position until after things quietened down. This happened in the morning about nine o'clock. We had to remain there because a few had caved into the dugout, but the enemy's plane was above us and it was taking photographs of the damage it had done. We couldn't make any change in our position, we had to remain there, so when I did leave this position to enter the dugout was the time I saw the casualties, which we became hard-hearted to,—and I saw Mr. Lumbra for the first time, being worked on. 967 968 969

2. The Court erred in admitting evidence against the objection and exception of the defendant in the testimony of the same witness relating to the effect of concussion of soldiers other than the plaintiff.

Q. Did you have some men in your outfit who underwent this type of concussion that

970 developed into mental cases while with you there in the service?

Mr. FitzGerald: I object—too highly immaterial and irrelevant.

The Court: That shows whether others were similarly affected.

Mr. FitzGerald: I lost an ear over there and others were not injured at all. That would not indicate they suffered injury.

The Court: I think I will let that go in.

Mr. FitzGerald: Exception.

971 Q. Tell us about that.

A. Yes, it has happened to several within our Company that we have had experience with. The first Vermonter killed in the World War was killed by concussion and he was not hit by any fragments of shells.

Q. Did some of them develop insanity or marked mental trouble?

A. In this particular case he was killed instantly, and others in the Company I believe are drawing compensation for injury;

972 they were shell-shocked at the time and had to be relieved.

Q. You remember that?

A. Yes, sir.

3. The Court erred in admitting evidence against the objection and exception of the defendant in the testimony of the witness Dr. Albee A. Skeels, in that he permitted the witness to go into detail in matters which were not at all responsive to the question.

Q. Will you tell us just how you happened to become acquainted with this case and interested in the matter? 973

A. He came over to my office and naturally began to speak about his case, and I immediately thought of a case in a friend of mine exactly similar to his, and cases I had already seen. Now it is a question in my mind then whether it is a case—you talk about shock—that is a very, very loose term,—you see, shock means a lot;—if I tell a man he's had a shock in most people it 974
means apoplexy or he had a nervous shock if may mean simply nervousness,—neurasthenia. To my thinking it is a question of drawing a line between a functional trouble, that is a trouble due to nervousness—what we say hysteria,—or an actual organic trouble. Now as I grow older, I very much doubt a good many cases of so-called functional trouble—they're not really organic trouble. For instance—shell shock in many
cases is called a sort of functional disease, 975
a disease of the nerves. You know what I mean—a woman is nervous at times,—it is a different thing; nervous is a very, very loose term and so is shock. Now in many cases of shell shock there's some organic basis to it;—there will be blood in the spinal fluid,—

Mr. FitzGerald: I submit it is not responsive.

976 The Court: It doesn't matter if it isn't it's all admissible, isn't it?

Mr. Fitzgerald: May I have an exception?

The Court: If it doesn't relate to the case, I will sustain your objection, but I won't sustain it because it is not responsive to the question.

Mr. Fitzgerald: I don't think the fact the Doctor has a friend with the same type of trouble I don't think it is admissible, the type of testimony that has been given.

977 The Court: It doesn't make any difference whether the cases he has seen are all friends or strangers. He can refer to his patient as a friend, or refer to him as a stranger, it doesn't make any difference; it shows his experience.

Mr. Fitzgerald: He doesn't say he has examined Mr. Lambra at all.

The Court: He says he came to his office.

Mr. McNamara: May we show he did go into Mr. Lambra's case and learned the history?

978 Witness: He did.

The Court: Go on.

Witness: Now the question, of course, I don't want to act as his attorney, your Honor.

The Court: There isn't any danger of that, Doctor. Go on and tell the jury.

A. (continued) The question in my mind is whether it is a functional thing or not. So, as I say, I have been rather skeptical about

people unless they're absolutely "malingerers," that is a term they use in the army for people trying to make out they're disabled or have some trouble when they haven't; in other words "skrimshankers" which isn't an uncommon ailment in the army and especially after the army. Now as I look on the case, he has apparently nervous seizures. Now the question of their being petit mal I have never seen anyone, and I don't know that anybody else has, but it's an indefinite thing, they lose consciousness for a very short time. For instance they're eating and might drop their fork, and if talking they might stop the flow of their conversation and then go on with it; that is one type. Now I have listened to the evidence of two practitioners who are experienced men Dr. Davidson and Dr. Johnson he saw him in the actual convulsion. Now leaving aside the petit mal, he certainly had actual convulsions because his tongue was bitten and he was unconscious afterwards. Now you cannot imitate that, as is apparently done, but you wouldn't deceive a doctor. You don't bite your tongue and don't void urine involuntarily, as he told me he did,—and two doctors, Dr. Davidson and Dr. Johnson who saw him have a convulsion, and good practitioners saw him. It isn't a question of that man malingering or having hysteria,—a functional attack, as sometimes

979

980

981

982 they have, but he absolutely had an epileptiform convulsion to my thinking, and I would swear it on a stack of bibles on that evidence, so the whole thing to my thinking is what is the cause of it? He never had convulsions of any kind in childhood. I am not going into the cause of convulsions in childhood but as applies to his case; straight epilepsy is a disease that develops before puberty and very rarely after twenty. Now this boy had convulsions I say he was twenty-five to
983 thirty now the cause for those in a great number of cases is some local lesion in the brain. Now in looking over his case naturally a man in the army, a man who is trying to get his rights, I was thinking what could be the cause of that. He told me he was thrown forty feet, and as I understand he has evidence to prove that; now you take a high explosive shell what they call "big stuff" six, eight, nine inch stuff, going at the speed I wouldn't want to estimate
984 the speed but you have all had experience, most people have with dynamite, and when you think of high explosive it is in the class with dynamite, only more powerful, going with such speed, you can imagine what a terrific shock it is. He was thrown forty feet. Now the brain is not a rigid organ at all and you don't necessarily have to have a fracture of the skull to have an injury that will cause convulsions afterwards. You don't necessarily have even a spicula of

bone tissue in the inner part of the bony cov- 985
ering of the brain to cause a convulsion You might get a pouring out of blood in greater or less degree, and one of the peculiar things about it is this,—that you don't necessarily have a true epileptic convulsion or an epileptiform convulsion until a period of years. For instance, you may get a thickening of the tissues and fibrous tissue forming. You know how a thickening what we call in the country "proud flesh"—how you get a large scar eventually. You might get this scar tis- 986
sue and as time went on, this tissue might contract and cause an irritation to the brain and cause convulsion.

WHEREFORE, the defendant prays that the judgment of the District Court for the District of Vermont may be reversed.

UNITED STATES OF AMERICA,
By Harry B. Amey,
United States Attorney. 987

ALLEN MARTIN,
Assistant United States Attorney.

WILLIAM J. HESSION,
Chief Attorney,
Veterans' Administration.

Clerk's Certificate.

988 I hereby assent to the filing of the above additional assignments of errors.

This 17 day of August, 1932.

J. A. McNamara,
Attorney for Plaintiff.

Filed August 17, 1932,
Austin H. Kerin,
Clerk.

---

989 **Clerk's Certificate.**

UNITED STATES OF AMERICA.

DISTRICT OF VERMONT.

I, Austin H. Kerin, Clerk of the District Court of the United States, within and for the District of Vermont, in the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 331, inclusive, contain a true and correct
990 transcript of the record filed by order of Honorable Harland B. Howe, United States District Judge, in the case entitled:

UNITED STATES OF AMERICA,
Appellant,
(Defendant Below),

vs.

NEWTON W. LUMBRA,
Appellee.
(Plaintiff Below).

as the same remains of record and on file in the office of the Clerk of said Court.

Clerk's Certificate.

991 IN TESTIMONY WHEREOF, I have hereunto caused the seal of said court to be hereunto, affixed at the City of Burlington in said District of Vermont, this day of in the year of our Lord one thousand nine hundred and thirty-two and of the Independence of the United States the one hundred and fifty-sixth.

....., Clerk.

992

993

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1932

No. 182

Argued December 22, 1932. Decided March 6, 1933

UNITED STATES OF AMERICA, Defendant-Appellant,

v.

NEWTON W. LUMBRA, Plaintiff-Appellee

Appeal from the District Court of the United States for the District of Vermont

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

From a judgment for the plaintiff entered on a verdict for $8,912.50, in an action to recover upon a policy of war risk insurance, the defendant appeals. Reversed.

Harry B. Amey, U. S. Atty., of Burlington, Vt., and Allen Martin, Asst. U. S. Atty., of Essex Junction, Vt. (Davis G. Arnold, William J. Hession, and Lawrence A. Lawlor, all of Washington, D. C., of counsel), for the United States.

J. A. McNamara, of Burlington, Vt., and Harold G. Sylvester, of St. Albans, Vt., for appellee.

AUGUSTUS N. HAND, Circuit Judge:

This is an appeal by the government from a judgment in favor of Newton W. Lumbra, who brought action to recover upon a war risk insurance policy. We think the judgment must be reversed, because there was no evidence that on May 1, 1919, when the policy lapsed for nonpayment of premiums, it was reasonably certain that the disability of the insured would continue throughout his life.

From 1917 to 1919 Lumbra was a soldier in the military service of the United States. He testified that he was injured in France during a bombardment by the explosion of a shell, which fell near him while he was on his way back from the trenches to his dugout. He suffered a physical injury to his ankle, and was thrown down and rendered unconscious by the concussion. The explosion occurred on

June 17, 1918. He was taken into his dugout, where he regained consciousness, and afterwards to the hospital, from which he was discharged late in August. Before the explosion he had been in good health. While confined in the hospital, he said that he had "faint, weak spells, dizzy spells—everything go black, and the sweat stand out on me and I would have to sit down." As soon as he had recovered from the injury to his ankle, he went back to his company and was given light work in the kitchen, but the "spells" continued and got gradually worse. After his return to the United States from France and his discharge from military service, which was on April 29, 1919, he went to his mother's house in Vermont, and did nothing for three or four months. He then began to work for the Wilcox Hall Company, rolling logs in their vats. This work was found to be too hard for him, and he was put at something lighter. He lost about half his time because of the dizzy spells, which got worse, and finally in 1921 he was forced to give up this employment. He then went to St. Albans and stayed for some time at a sister's, after which he obtained employment as a machinist's helper with the Vermont Central Railroad. He first worked for the railroad in that capacity, and later as a laborer. This employment with the railroad lasted from June, 1922, for about a year, but he lost considerable time owing to his ailment. In June, 1923, he went to work for the Boston & Maine Railroad, and worked until November, losing considerable time with it because of his condition. He then returned to the Vermont Central and remained with it until February, 1929, but was put at light work, and finally was only able to sweep around the railroad shop and attend to the lavatories. His attacks increased in frequency; and in 1923 they manifested themselves in epileptic seizures, which became so frequent and severe that in 1929 he had to cease all employment. From 1926 Lumbra was in the hospital seven different times from two weeks to two months. There was testimony that the railroad employed him as long as it did because he was an overseas veteran and veterans were specially favored.

Dr. Skeels testified as an expert on behalf of the plaintiff. He said that in his opinion he had "epileptiform convulsions * * * and they were caused by an injury he had from the high explosive. * * *" But there was no

testimony that when he allowed his policy to lapse his condition was such that it could be said with reasonable certainty that he then had epilepsy or that epilepsy would ensue or that for any reason he was then permanently disabled. There was evidence from which a jury might find that, when the plaintiff ceased to pay premiums in May, 1919, he was totally disabled, but none from which they might find that his disability was permanent.

There was evidence on behalf of the defendant that the plaintiff was not subject to epileptic seizures, but that his condition was one of "mixed neurasthenia and hysteria." The defendant also introduced various applications by Lumbra for employment with the Central Vermont Railroad in which he stated that he had no physical defect. The plaintiff's own evidence, however, was substantially as we have stated.

There is no liability for permanent total disability occurring after the lapse of a war risk insurance policy, even though caused by injuries suffered during military service and while the policy is in force. Eggen v. United States (C. C. A.) 58 F. (2d) 616; United States v. McLaughlin, 53 F. (2d) 450 (C. C. A. 8). Liability must be founded upon total permanent disability while the policy is in force.

Total disability is any impairment of mind or body which renders it impossible for the insured to engage continuously in any substantially gainful occupation, and total disability is permanent if it is founded upon conditions which make it reasonably certain that it will continue throughout life. In the present case a jury might find that in May, 1919, the insured could not engage continuously in any gainful occupation. He testified that he was then subject to spells of dizziness and faintness which prevented continuous work, but there is nothing to show that at that time conditions were such that it could be said with reasonable certainty that he was not likely to recover. Dr. Skeels' testimony that in his opinion the epileptiform convulsions were caused by an injury from the high explosive was no proof that in May, 1919, it was reasonably certain that permanent disability would result from his then condition. Dr. Skeels never said in words or substance that a man having a subsequent bodily history like that of Lumbra was in a condition in May, 1919, that made permanent disability reasonably certain. Nor did any one testify that in May,

1919, the "spells," if arising from the explosion of the shell near the plaintiff would be permanent or would result in epileptic convulsions proximately or ultimately. It is not enough to show that four years after the "spells" began epilepsy supervened. In May, 1919, the plaintiff himself was not aware of any permanent disability, nor apparently was his Physician, Dr. Titus, who treated him in December, 1929, for "rheumatism, chronic branchitis and nervousness." It is not shown that his condition was incurable in May, 1919, merely because it became so years later. For aught we know, various things other than the shock of the explosion may have contributed to the epileptic convulsions, even though the convulsions would not have occurred without it. For a layman or a petit jury to say that Lumbra's supposed brain lesion or other injury caused by the explosion, though sufficient to produce attacks of dizziness and headaches, involved a condition which rendered it reasonably certain that disability would continue during lifetime, is indulging in mere guesswork. They and we manifestly know nothing about it, and the plaintiff's case was not established by proof that epilepsy finally ensued. The only one who can offer convincing testimony on such a subject is an expert. Such a person may be able to say that the conditions in May, 1919, were reasonably certain to produce permanent disability. No such evidence was produced, and the plaintiff failed to establish his claim because it was lacking. Eggen v. United States, 58 F. (2d) 616 (C. C. A. 8); United States v. McLaughin, 53 F. (2d) 450 (C. C. A. 8); Blair v. United States, 47 F. (2d) 109 (C. C. A .8). This result is in accordance with the rule laid down in Clapp v. United States (C. C. A.) — F. (2d) —, the opinion in which is filed herewith.

The judgment is accordingly reversed.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the courtrooms, in the Post Office building, in the city of New York, on the 13th day of March, one thousand nine hundred and thirty-three.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

NEWTON W. LUMBRA, Plaintiff-Appellee,

vs.

UNITED STATES, Defendant-Appellant

Appeal from the District Court of the United States for the District of Vermont

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of Vermont and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, reversed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. Newton W. Lumbra vs. United States. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed March 14, 1933. William Parkin, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 336, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the case of Newton W. Lumbra, Plaintiff-Appellee, against United States, Defendant-Appellant, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 3rd day of June, in the year of our Lord one thousand

nine hundred and thirty-three, and of the Independence of the United States the one hundred and fifty-seventh.

Wm. Parkin, Clerk. (Seal of United States Circuit Court of Appeals, Second Circuit.)

June 6, 1933.

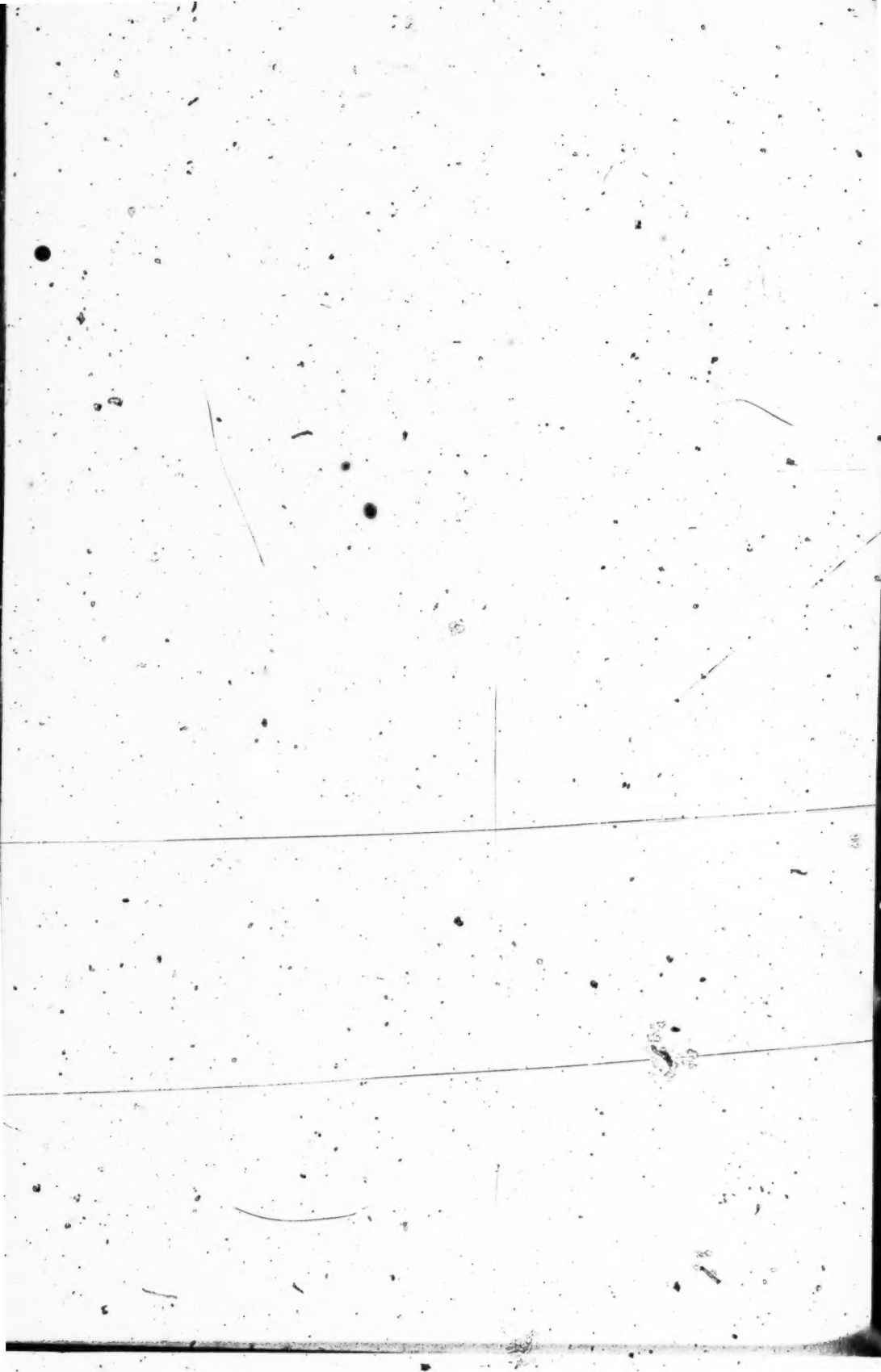
For cause shown, the time within which a petition for writ of certiorari may be filed is extended until and including June 27, 1933.

Pierce Butler.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



FILE COPY

JUN 9

CHARLES ELMO

IN THE

Supreme Court of the United States

October Term, 1933.

No. [redacted] 152

NEWTON W. LUMBRA,
Petitioner and Appellee below,

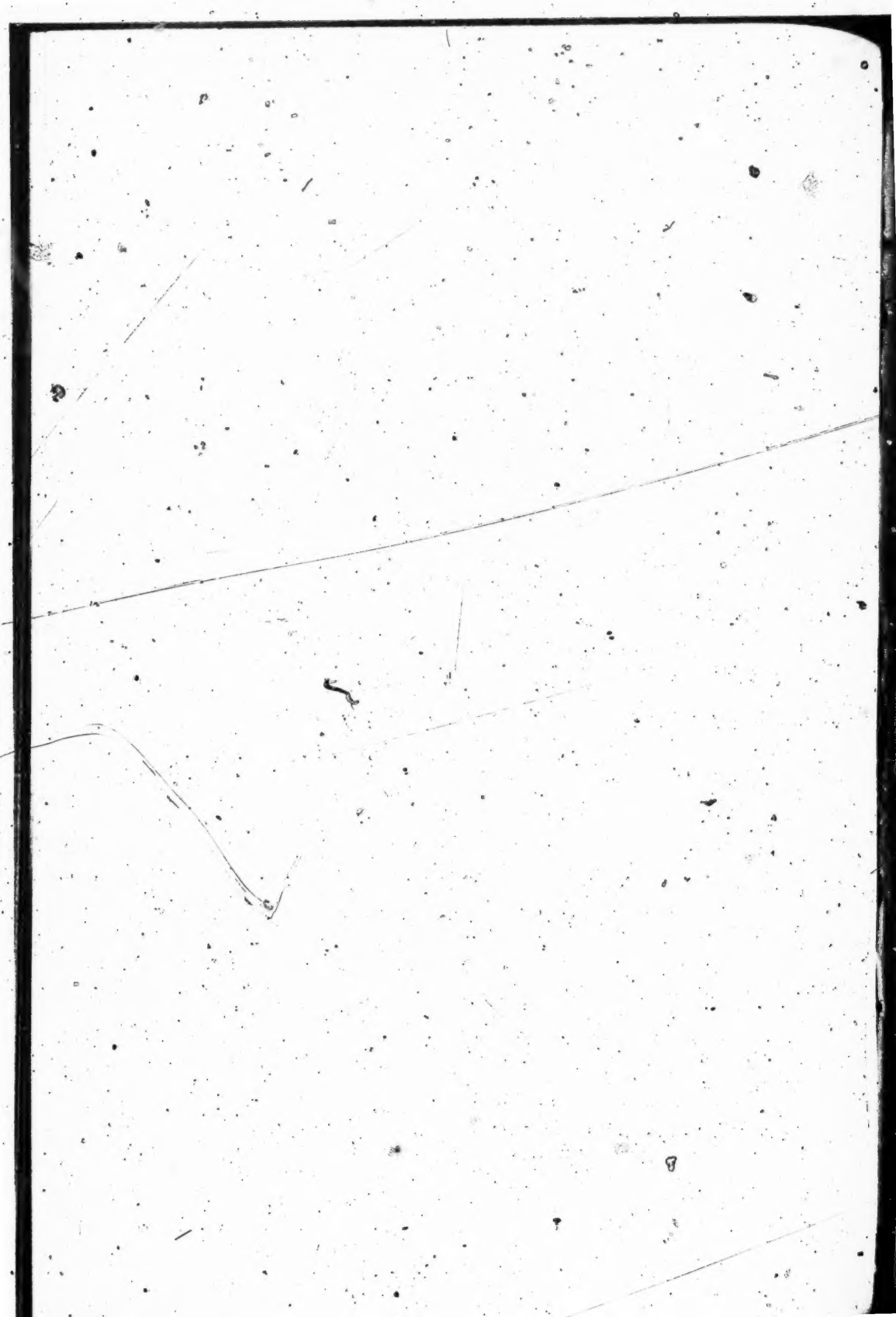
vs.

UNITED STATES OF AMERICA,
Respondent and Appellant below.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

J. A. McNAMARA,
HAROLD C. SYLVESTER,
CONSUELO B. NORTHROP,
Counsel for Petitioner.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.



INDEX.

	Page
Petition for Writ	1
Summary statement of matter involved	1
Reasons relied upon for the Allowance of Writ	3
Prayer for Writ	4
Brief in Support of petition for Writ of Certiorari	5
Opinion of Courts below	5
Jurisdiction	12
Statement of Case	13
Specification of Errors	13
Argument	14
Point I	14
Point II	18
Conclusion	19

AUTHORITIES CITED.

Cases.

Bartee vs. U. S. 60 Fed. (2) 247 C. C. A. 6	3, 19
Black vs. Travellers Ins. Co., 121 Fed. 732	19
Jenkins vs. Pacific M. L. Ins. Co., 131 Calif. 121, 63 Pac. 180	17
Knickerbocker Life Ins. Co. vs. Trefz, 104 U. S. 197, 26 L. Ed. 708	19
Layne Corp. vs. Western Well Works, 261 U. S. 387, 43 Sup. C. 422, 67 L. Ed. 712	13
Nat'l Accident Society vs. Rolstin, 101 Ill. Appeals 192	17
New Orleans, etc. vs. National Rice Mills Co., 234 U. S. 80, 39 Sup. C. 726, 58 L. Ed. 1223	17
N. Y. Life Insurance vs. Brown, 39 Fed. (2) 376, (C. C. A. 5)	17
Preferred Accident Insurance Co. vs. Barker, 93 Fed. 158, (C. C. A. 5)	17, 19
Rawlins vs. Business M. A. Association, 204 Mo. Appeal 679, 220 S. W. 1022	17
Reynold vs. Equitable Accident Co., 48 Hun. N. Y. 605, 1 N. Y. 738	17
Travellers Insurance Co. of Hartford, Conn. vs. Sadie P. McConkey, 127 U. S. 661, 8 Sup. C. 1360, 32 L. E. D. 308	13, 17
Travellers Insurance Co. vs. Shepard, 85 Ga. 751, 12 S. E. 18	17
Tyrakowski vs. U. S., 50 Fed. (2) 776, (C. C. A. 7)	3, 11, 12, 19
U. S. vs. Fitzpatrick, 60 Fed. (2) 562, (C. C. A. 10)	3, 19
U. S. Casualty Co. vs. Hanson, 20 Colo. A. 393, 79 Pac. 176	19
Utter vs. Travellers Insurance Co., 65 Mich. 545	17
Western Electric Company vs. Splitdorf Elec. Co., 264 U. S. 463, 44 Sup. C. 342, 68 L. Ed. 792	13

STATUTES.

	Page
Title 38 Sec. 445 U. S. C. A.	2
Title 28 Sec. 762—763—765 U. S. C. A.	2
40 Stat. 555	14
43 Stat. 609	15

TEXTS.

7 Couch on Insurance 5495	18, 19
2 Couch on Insurance 1512	18, 19
Jones Commentary on Evidence 1913 Vol. 2, Sec. 372	18
1 C. J. 511	19

IN THE

Supreme Court of the United States

October Term, 1933.

No. 183.

NEWTON W. LUMBRA,
Petitioner and Appellee below,

vs.

UNITED STATES OF AMERICA,
Respondent and Appellant below.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, and Brief in Support Thereof.

To the Honorable, the Supreme Court of the United States.

Your petitioner respectfully shows:

I.

SUMMARY STATEMENT OF MATTER INVOLVED.

This is an action at law brought in the United States District Court for the District of Vermont by Newton W. Lumbra, petitioner herein, against the United States of America, respondent herein, for the recovery of benefits upon a War Risk Insurance Policy.

Trial was by jury and a verdict and judgment was rendered in favor of Newton W. Lumbra against the United States of America for $8912.50. An appeal from said judgment was taken by the respondent to the Circuit Court of Appeals for the Second Circuit, which reversed the judgment of the District Court.

The petitioner was a soldier in the United States Army from 1917 to 1919 and carried a policy of War Risk Insurance, which lapsed for non-payment of premiums on May 1, 1919. During petitioner's war service and while the policy was in effect, petitioner was injured in France by the explosion of a high explosive shell which fell near him during a bombardment of the trenches where he was on duty. Petitioner was removed to the hospital and while in the hospital he had "faint, weak spells * * * * everything go black and the sweat stand out on me and I would have to sit down". He was returned to active duty but these spells continued and grew gradually worse. He was suffering from this condition when discharged and when the policy lapsed. This condition continued after discharged and until 1923 when epilepsy developed and he has since been subject to epileptic attacks at frequent intervals.

Action was brought by the petitioner under Title 38, Sec. 445 U. S. C. A. which authorizes suits against the United States on policies of War Risk Insurance under title 28, Sects. 762, 763 and 765 U. S. C. A. known as the Tucker Act.

The question involved was whether or not the petitioner had become permanently and totally disabled within the meaning of the War Risk Insurance Act at

the date the policy lapsed for non-payment of premiums. The case was submitted to the jury and a verdict was returned for the petitioner. Judgment was entered upon the verdict.

The case was appealed to the Circuit Court of Appeals for the Second Circuit by the respondent, the United States, and said Court reversed the judgment of the United States District Court for the District of Vermont in an opinion filed March 6, 1933. The main question involved in the Circuit Court of Appeals was whether or not there was sufficient evidence of petitioner's permanent and total disability at the time petitioner's policy lapsed for non-payment for the trial Court to submit the case to the jury, which question was decided by said Circuit Court of Appeals for the Second Circuit and materially affected the determination of said appeal.

II.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. The decision of the Circuit Court of Appeals as to the test of the permanency of the petitioner's total disability is in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit on the same matter in the case of Tyrakowski vs. U. S. 50 Fed. (2) 766, (C. C. A. 7) and is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit on the same matter in the case of Bartee vs. U. S. 60 Fed. (2) 247, (C. C. A. 6) and with the case of U. S. vs. Fitzpatrick, 62 Fed. (2) 562, (C. C. A. 10).

2. The decision of the Circuit Court of Appeals of the Second Circuit as to the measure of proof re-

quired by holding that the question of permanence of disability is one that can be established only by expert evidence is a decision of an important question of general law probably untenable and in conflict with the weight of authority.

3. The decision of the Circuit Court of Appeals as to the test of permanent and total disability by holding that the question of permanence can be established only by expert evidence involves an important question of Federal law which has not been but should be settled by this Court.

WHEREFORE your petitioner prays that a Writ of Certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit commanding said Court to certify and send to this Court the full and complete transcript of the record and of the proceedings of said Circuit Court of Appeals had in the case numbered and entitled on its docket No. 183, United States of America, defendant-appellant vs. Newton W. Lumbra, plaintiff-appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States and that the judgment herein of said Circuit Court be reversed by the Court and for such further relief as to this Court may seem proper.

Dated, May twenty-fifth, 1933.

NEWTON W. LUMBRA,
by
J. A. MCNAMARA,
HAROLD C. SYLVESTER,
CONSUELO B. NORTHROP,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

NEWTON W. LUMBRA,
Petitioner and Appellee below,

vs.

UNITED STATES OF AMERICA,
Respondent and Appellant below.

No. 183.

Brief in Support of Petition for Writ of Certiorari.

I.

Opinion of the Courts Below.

The opinion in the Circuit Court of Appeals for the Second Circuit is reported in 63 Fed. (2) 796, as follows:

AUGUSTUS N. HAND, *Circuit Judge:*

This is an appeal by the government from a judgment in favor of Newton W. Lumbra, who brought action to recover upon a War Risk Insurance policy. We think the judgment must be reversed, because there was no evidence that on May 1, 1919, when the policy lapsed for non-payment of premiums, it was reason-

ably certain that the disability of the insured would continue throughout his life.

From 1917 to 1919 Lumbra was a soldier in the military service of the United States. He testified that he was injured in France during a bombardment by the explosion of a shell, which fell near him while he was on his way back from the trenches to his dugout. He suffered a physical injury to his ankle and was thrown down and rendered unconscious by the concussion. The explosion occurred on June 17, 1918. He was taken into his dugout where he regained consciousness, and afterwards to the hospital, from which he was discharged late in August. Before the explosion he had been in good health. While confined in the hospital he said that he had "faint, weak spells, dizzy spells,—everything go black, and the sweat stand out on me and I would have to sit down." As soon as he had recovered from the injury to his ankle he went back to his company and was given light work in the kitchen, but the "spells" continued and got gradually worse. After his return to the United States from France and his discharge from military service, (which was on April 29, 1919), he went to his mother's house in Vermont, and did nothing for three or four months. He then began to work for the Wilcox Hall Company, rolling logs in their vats. This work was found to be too hard for him, and he was put at something lighter. He lost about half his time because of the dizzy spells, which got worse, and finally in 1921 he was forced to give up this employment. He then went to St. Albans and stayed for some time at a sister's, after which he obtained employment as a machinist's helper with the Vermont Central Railroad. He first worked for the

railroad in the capacity, and later as a laborer. This employment with the railroad lasted from June, 1922, for about a year, but he lost considerable time owing to his ailment. In June, 1923, he went to work for the Boston & Maine Railroad, and worked until November, losing considerable time with it because of his condition. He then returned to the Vermont Central and remained with it until February, 1929, but was put at light work, and finally was only able to sweep around the railroad shop and attend to the lavatories. His attacks increased in frequency; and in 1923 they manifested themselves in epileptic seizures, which became so frequent and severe that in 1929 he had to cease all employment. From 1926 Lumbra was in the hospital seven different times from two weeks to two months. There was testimony that the railroad employed him as long as it did because he was an overseas veteran and veterans were specially favored.

Dr. Skeels testified as a expert on behalf of the plaintiff. He said that in his opinion he had "epileptiform convulsions * * * and they were caused by an injury he had from the high explosive * * *." But there was no testimony that when he allowed his policy to lapse his condition was such that it could be said with reasonable certainty that he then had epilepsy or that epilepsy would ensue or that for any reason he was then permanently disabled. There was evidence from which a jury might find that when the plaintiff ceased to pay premiums in May, 1919, he was totally disabled, but none from which they might find that his disability was permanent.

There was evidence on behalf of the defendant that the plaintiff was not subject to epileptic seizures, but

that his condition was one of "mixed neurasthenia and hysteria." The defendant also introduced various applications by Lumbra for employment with the Central Vermont Railroad in which he stated that he had no physical defect. The plaintiff's own evidence, however, was substantially as we have stated.

There is no liability for permanent total disability occurring after the lapse of a War Risk Insurance policy, even though caused by injuries suffered during military service and while the policy is in force. Eggen v. United States, 58 Fed. (2nd) 616; United States v. McLaughlin, 53 Fed. (2nd) 400, (C. C. A. 8). Liability must be founded upon total permanent disability while the policy is in force.

Total disability is any impairment of mind or body which renders it impossible for the insured to engage continuously in any substantially gainful occupation, and total disability is permanent if it is founded upon conditions which make it reasonably certain that it will continue throughout life. In the present case a jury might find that in May, 1919, the insured could not engage continuously in any gainful occupation. He testified that he was then subject to spells of dizziness and faintness which prevented continuous work, but there is nothing to show that at that time conditions were such that it could be said with reasonable certainty that he was not likely to recover. Dr. Skeel's testimony that in his opinion the epileptiform convulsions were caused by an injury from the high explosive was no proof that in May, 1919, it was reasonably certain that permanent disability would result from his then condition. Dr. Skeels never said in

words or substance that a man having a subsequent bodily history like that of Lumbra was in a condition in May, 1919, that made permanent disability reasonably certain. Nor did anyone testify that in May, 1919, the "spells," if arising from the explosion of the shell near the plaintiff, would be permanent or would result in epileptic convulsions proximately or ultimately. It is not enough to show that four years after the "spells" began epilepsy supervened. In May, 1919, the plaintiff himself was not aware of any permanent disability, nor apparently was his physician, Dr. Titus, who treated him in December, 1920, for "rheumatism, chronic bronchitis and nervousness." It is not shown that his condition was incurable in May, 1919, merely because it became so years later. For aught we know, various things other than the shock of the explosion may have contributed to the epileptic convulsions, even though the convulsions would not have occurred without it. For a layman or a petit jury to say that Lumbra's supposed brain lesion or other injury caused by the explosion, though sufficient to produce attacks of dizziness and headaches, involved a condition which rendered it reasonably certain that disability would continue during lifetime is indulging in mere guesswork. They and we manifestly know nothing about it, and the plaintiff's case was not established by proof that epilepsy finally ensued. The only one who can offer convincing testimony on such a subject is an expert. Such a person may be able to say that the conditions in May, 1919, were reasonably certain to produce permanent disability. No such evidence was produced and the plaintiff failed to establish his claim because it was lacking. Eggen v. United States, 58 Fed. (2nd) 616, (C. C. A.

8); United States v. McLaughlin, 53 Fed. (2nd) 450, (C. C. A. 8); Clair v. United States, 47 Fed. (2nd) 109, (C. C. A. 8). This result is in accordance with the rule laid down in Clapp v. United States, the opinion in which is filed herewith.

The judgment is accordingly reversed.

L. HAND and SWAN, Concur.

Since the rule referred to above was laid down in Clapp v. United States, the opinion in which was filed with the opinion in the instant case, so much of said opinion as states the rule is here added.

"L. HAND, *Circuit Judge:*

* * * The proper test, we think, is this. The insured can recover only by showing that at the lapse he was suffering from some ailment, of which it is possible to say with reasonable certainty that it was incurable at that time, or with equal certainty that it must lead to another and incurable ailment. The fact alone that it did culminate in such another does not make a case. This is apparently the doctrine in the Eighth Circuit. McLaughlin v. U. S., 53 Fed. (2) 450; Eggen v. U. S., 58 Fed. (2) 616; Proechal v. U. S., 59 Fed. (2) 648. The discussion of Judge Sanborn in Eggen v. U. S. is particularly enlightening. *Cf.* Nicolay v. U. S., 51 Fed. (2) 170, 173, (C. C. A. 10). There are indeed decisions where permanance seems to have been assumed merely from the fact that at the trial the disability had become so, but, so far as we can find, the point was not discussed. Ford v. U. S., 44 Fed. (2) 754, (C. C. A. 1); Auer v. U. S., 51 Fed. (2) 921, (C. C. A. 3); Madray v. U. S., 55 Fed. (2) 552, (C. C.

A. 4); U. S. v. Phillips, 44 Fed. (2) 689, (C. C. A. 8); Fladeland v. U. S., 53 Fed. (2) 17, (C. C. A. 9); Golden v. U. S., 34 Fed. (2) 367, (C. C. A. 10). So far as these decisions may be thought to countenance an opposite view, we think that the doctrine of the Eighth Circuit is the better. Tyrakowski v. U. S., 50 Fed. (2) 766, (C. C. A. 7) seems to have been consciously to the contrary, but we cannot accept it. We hold that the only use to be made of information which becomes available between the lapse and the trial, is to discover what was the actual pathological condition of the insured at the lapse; the prognosis, once that is discovered, is to be made as of the lapse and without regard to what in fact followed.

In the case at bar, no doctor declared that at the end of May, 1919, the plaintiff was suffering from duodenal ulcer. Only on the hypothesis that he was, did the plaintiff argue that his indigestion was reasonably certain permanently to disable him. No doctor was found hardy enough to say that indigestion, unaccompanied by ulcer, was reasonably certain so to continue for life. Should one appear, we must await his testimony before passing upon it. The existence of a duodenal ulcer in May, 1919, was not for a jury to determine upon its own uninformed intuitions. It was a strictly medical question; without the help of those skilled in the science, the conclusions of laymen upon such an issue were without adequate basis, and necessarily mere speculation. Only those familiar with the origin and course of the malady were competent to testify, and without testimony a verdict stood unsupported."

AUGUSTUS N. HAND, SWAN. Concur.

II.

Jurisdiction.

1. The date of the judgment to be reviewed is March 6, 1933.

2. The rulings of the Circuit Court of Appeals were such as to bring this case within Rule 38, Sect. 5b.

(a). The decision raises a conflict with decisions of other Circuit Courts of Appeal.

The opinion in this case states "This result is in accordance with the rule laid down in Clapp vs. U. S. the opinion in which is filed herewith". The opinion in Clapp vs. U. S. relative to the rule in question is as follows: "There are indeed decisions where permanence seems to have been assumed merely from the fact that at the trial the disability had become so, but, so far as we can find, the point was not discussed (cases cited). So far as these decisions may be thought to countenance an opposite view, we think that the doctrine of the Eighth Circuit is the better. Tyrakowski v. U. S., 50 Fed. (2) 766, (C. C. A. 7) seems to have been consciously to the contrary, but we cannot accept it". The Circuit Court of Appeals for the Second Circuit has therefore decided an important and material question in conflict with a decision of another Circuit.

(b) The decision has decided an important question of law probably in conflict with the weight of au-

thority and probably in conflict with applicable decisions of this Court.

(c) The decision in question has decided an important question of Federal Law which has not been but should be settled by this Court.

3. Cases believed to sustain the jurisdiction of this Court are as follows:

Layne & Bowler Corp. v. Western Well Works, 261 U. S. 387, 43 Sup. C. 422, 67 L. Ed. 712.

Western Electric Co. v. Splitdorf Electrical Co., 264 U. S. 463, 44 Sup. C. 342, 68 L. Ed. 792.

U. S. v. Arzner, No. 191
U. S. Sup. Ct. Oct. Term, 1932

III.

Statement of Case.

This has already been stated in the preceding petition under I (pp. 1-3), which is hereby adopted and made part of this Brief.

IV.

Specifications of Errors.

1. The Circuit Court of Appeals erred in holding that the permanence of a total disability at date of lapsation of policy for non-payment of premium was a fact requiring expert evidence.

2. The Circuit Court of Appeals erred in holding that because no expert evidence was produced of the permanence of petitioner's total disability at date of lapsation of policy for non-payment of premium, the petitioner failed to establish his claim.

V.

Argument.

1. THE DECISION OF THE COURT BELOW IN HOLDING THAT THE PERMANENCE OF A TOTAL DISABILITY AT DATE OF LAPSATION OF POLICY FOR NON-PAYMENT OF PREMIUM WAS A FACT REQUIRING EXPERT EVIDENCE IS IN DIRECT CONFLICT WITH THE RULE OF LAW OF THIS COURT APPLICABLE TO SUCH CASES AND WITH THE WELL SETTLED AND UNIVERSALLY RECOGNIZED RULE OF LAW AS ANNOUNCED IN THE DECISION OF THIS AND OTHER COURTS.

PERTINENT STATUTES AND REGULATIONS.

Section 13 of the War Risk Insurance Act (40 Stat. 555) is in part:

> That the director subject to the general direction of the Secretary of the Treasury, shall administer, execute and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, and shall decide all questions arising under the Act, except as otherwise provided in Section five.

Section 5 of the World War Veterans' Act (43 Stat. 609 U. S. C. 426), is in part:

> The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, and shall decide all questions arising under this Act; and all decisions of questions of fact and law affecting any claimant to the benefits of Titles II, III, or IV of this Act shall be conclusive except as otherwise provided herein.

(T. D. 20, W. R.)

TOTAL DISABILITY.

Regulation No. 11 relative to the definition of the term "total disability" and the determination as to when total disability shall be deemed permanent.

Treasury Department

Bureau of War Risk Insurance

Washington, D. C., March 9, 1918

By virtue of the authority conferred in Section 13 of the War Risk Insurance Act, the following regulation is issued relative to the definition of the term "total disability", and the determination as to when disability shall be deemed permanent: Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, in Articles III and IV, to be total disability.

"Total disability" shall be deemed to be "permanent", whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering

from it. Whenever it shall be established that any person to whom any installment of insurance has been paid as provided in Article IV on the ground that the insured has become totally and permanently disabled has recovered the ability to continuously follow any substantially gainful occupation the payment of installments of insurance shall be discontinued forthwith and no further installments thereof shall be paid so long as such recovered ability shall continue.

WILLIAM C. DEL'ANNO,
Director.

Approved:
W. G. McADOO
Secretary of the Treasury.

Total disability therefore shall be deemed permanent whenever it is found upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. The Circuit Court of Appeals has construed "reasonably certain that it will continue throughout the life of the person suffering from it" as requiring expert evidence. This is identical with the type of cases requiring "an eye witness to death or personal injury, 'a direct and positive proof of accident causing death or injury'", and similar expressions frequently embodied in life and accident and health policies.

This Court has definitely established the rule in such matters and this rule has been adopted so that it is a well settled rule of law and weight of authority. No particular type of evidence is required but all material and relevant evidence, whether direct or circumstantial, must be submitted.

"The requirement, however of direct and positive proof, as to certain matters, did not make it neces-

sary to establish the fact and attendant circumstances of death by persons who were actually present when the insured received the injuries which caused his death * * *. The evidence on that point was direct and positive, as much so, within the meaning of the policy as if it had come from one who saw the pistol fired and the proof on this point is none less direct or positive because supplemented or strengthened by evidence of a circumstantial character."

Travellers Insurance Co. of Hartford, Conn. vs. Nadie P. McConkey, 127 U. S. 661.

New Orleans, etc. vs. National Rice Mills Co., 234 U. S. 80, 30 Sup. C. 726, 58 L. Ed. 1223.

Preferred Accident Insurance Co. vs. Barker, 93 Fed. 158 (C. C. A. 5).

Jenkins v. Pacific M. L. Insurance Co., 131 Calif. 121, 63 Pac. 180.

National Accident Society vs. Bolstin, 101 Ill. Appeals 192.

Travellers Insurance Co. vs. Shepard, 85 Ga. 751, 12 S. E. 18.

Utter vs. Travellers Insurance Co., 65 Mich. 545.

Rawlins vs. Business M. A. Association, 204 Mo. Appeal 679, 220 S. W. 1022.

Reynold vs. Equitable Accident Co., 48 Hun. N. Y. 605, 1 N. Y. 738.

N. Y. Life Insurance vs. Brown, 39 Fed. (2) 376 (C. C. A. 5).

A definitely established rule on contracts requiring a particular type of proof is that any such requirement does not preclude the use of circumstantial evidence or even the reliance wholly upon such evidence,

since to exclude these forms of evidence would be to permit the policy to control and abrogate the established rule of law that a contract may be supported by circumstantial evidence in violation of the further rule that such a conflict must be reconciled by adherence to the law and repudiation of the contract provision.

7 Couch on Insurance, 5495.

The reason given for holding this as an established rule of law in this class of cases is that the Courts are not disposed to favor stipulations or agreements, in effect, tending to overthrow the established rules of evidence.

2 Couch on Insurance, 1512.

The rule of the Circuit Court requiring expert testimony bases the proof of one of the two essential questions in cases of this type upon expert opinion rather than upon all the evidence. The Courts have generally refused to adopt such a rule and it is contrary to the universally established rule in such manner.

Jones Commentary on Evidence 1913.

2. THE DECISION OF THE COURT BELOW REQUIRING EXPERT EVIDENCE OR ANY PARTICULAR TYPE OF EVIDENCE IS IN DIRECT CONFLICT WITH THE ESTABLISHED RULE OF THIS COURT AND WITH THE WELL SETTLED AND UNIVERSALLY RECOGNIZED RULE OF LAW AS ANNOUNCED IN THE DECISION OF THIS AND OTHER COURTS.

The question of disability or permanence of disability of any other element of petitioner's case is to

be established by a preponderance of all relevant evidence.

Knickerbocker Life Insurance Co. vs. Trefs, 104 U. S. 197, 26 L. Ed. 708.

Preferred Accident Insurance Co. vs. Barker, 93 Fed. 158.

Black vs. Travellers Insurance Co., 121 Fed. 732.

7 Couch on Insurance, 5495.

2 Couch on Insurance, 1512:

"It is for the jury to determine whether insured has suffered a total or partial disability and whether disability is permanent."

1 Corpus Juris, 511.

U. S. Casualty Co. vs. Hanson, 20 Colo. A. 393, 79 Pac. 176.

Tyrakowski vs. U. S. 50 Fed. (2) 766 (C. C. A. 7).

Bartee vs. U. S., 60 Fed. (2) 247 (C. C. A. 6).

U. S. vs. Fitzpatrick, 62 Fed. (2) 562 (C. C. A. 10).

Conclusion.

It is respectfully urged that the question for determination was whether or not petitioner's total disability was a permanent one at date policy lapsed, to be decided upon all the evidence relevant thereto and was not dependent upon expert evidence tending to establish this fact.

It conclusively appears that the decision of the Court below is in direct conflict with decisions of this Court and with the well settled and universally recog-

nized rule of law applicable to said matters. The questions involved are important questions of federal, local and general law and involve the interpretation of a United States Statute.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

J. A. McNamara,
Harold C. Sylvester,
Consuelo B. Northrop,
Counsel for Petitioner.

FILE COPY

Office Supreme Court,
FILED
NOV 17 1933
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 152

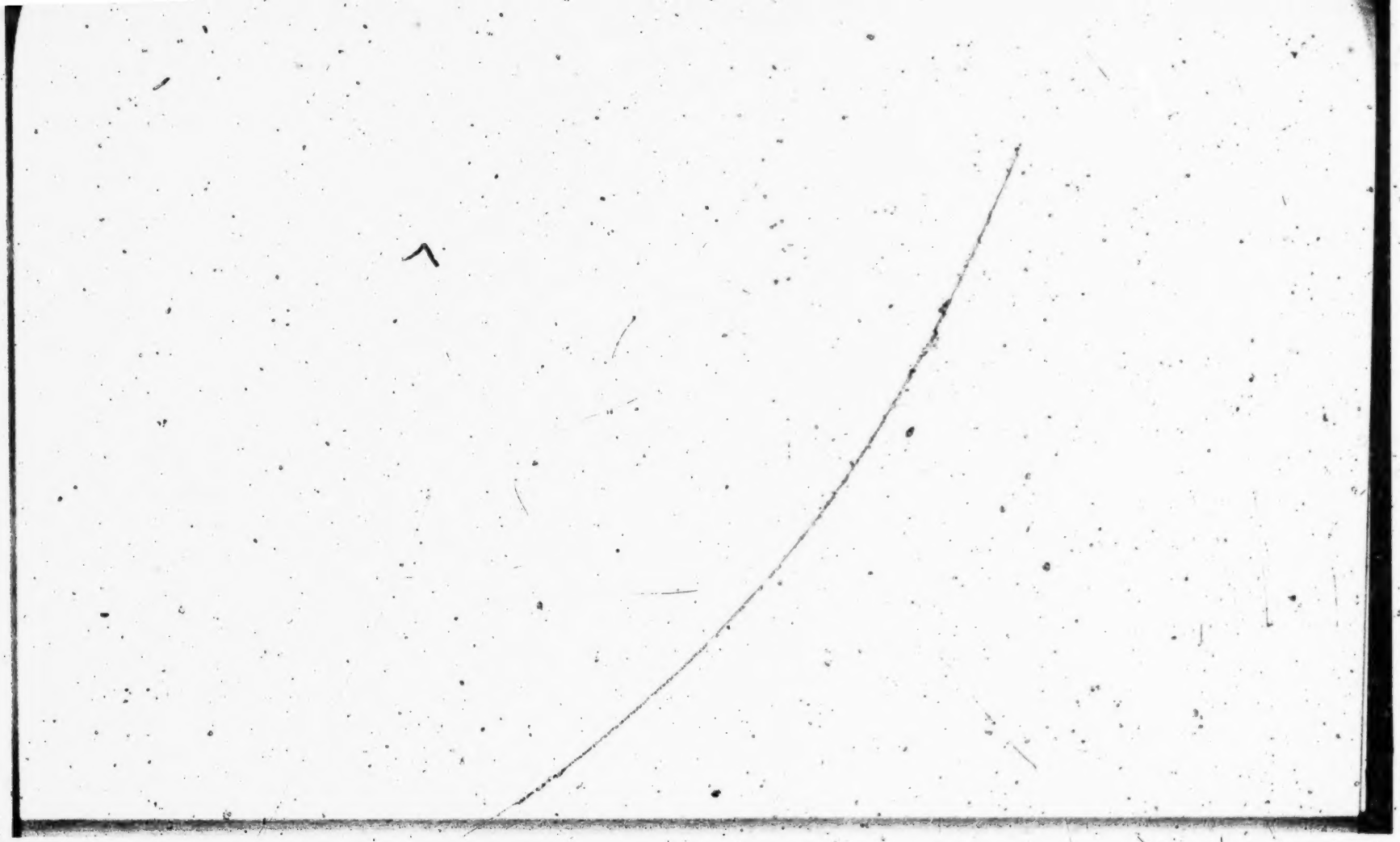
NEWTON W. LUMBRA, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER.

HAROLD C. SYLVESTER,
WARREN E. MILLER,
Counsel for Petitioner.



INDEX

Subject Index.

	Page
Brief for petitioner	1
Statement of the case	1
Specification of errors	5
Brief of the argument	5
Argument	7
Point I	7
II	13
III	20
IV	26
V	35
VI	37
VII	37
Conclusion	43

Cases Cited.

Accident Insurance Co. v. Bennett, 90 Tenn. 701 12

Atchison, T. & S. F. R. Co. v. Toops, 281 U. S. 351, 74 L. Ed. 896, 50 S. Ct. 281 36

Barksdale v. U. S. (C. C. A. 10), 46 Fed. (2d) 762, 764 ..... 22, 41

Bartee v. U. S. (C. C. A. 6), 60 Fed. (2d) 247 43

Carter v. U. S. (C. C. A. 4), 49 Fed. (2d) 221 ..... 20, 23, 43

Charter Oak Life Insurance Co. v. Rodell, 96 U. S. 232, 24 L. Ed. 633. 11

Connecticut Mutual Life Ins. Co. v. Lathrop, 111 U. S. 612, 28 L. Ed. 536 ..... 25, 26, 37, 39

Connecticut Mutual Life Ins. Co. of Hartford v. Akens, 150 U. S. 468, 37 L. Ed. 1148 10

Couch on Insurance, Volume 2, Section 1512; Volume 7, Section 5495. 12

Fladeland v. U. S. (C. C. A. 9), 53 Fed. (2d) 17 43

Gulf, M. & N. Co. v. Wells, 275 U. S. 455, 72 L. Ed. 370, 48 S. Ct. 151. 36

Hicks v. U. S. (C. C. A. 4), 65 Fed. (2d) 517 42

Jenkins v. Hawkeye Comm. M. A., 147 Iowa 113 12

Jenkins v. Pacific National Life Ins. Co., 131 Calif. 121, 63 Pac. 180.. 10

Kansas City Southern R. Co. v. Jones, 276 U. S. 393, 72 L. Ed. 583, 48 S. Ct. 308 36

Kelley v. U. S. (C. C. A. 1), 49 Fed. (2d) 897 43

LaMarche v. U. S. (C. C. A. 9), 28 Fed. (2d) 828 43

Lewis v. Brotherhood Accident Co., 184 Mass. 1 12

McGovern v. U. S. (Dist. Ct., Montana), 294 Fed. 108 41

Madrey v. U. S. (C. C. A. 4), 55 Fed. (2d) 552 ..... 20, 23, 43

	Page
Malavski v. U. S. (C. C. A. 7), 43 Fed. (2d) 974	20, 22, 43
Mitchell v. Brotherhood Locomotive F. E., 103 Neb. 701	12
Mullvanna v. U. S. (C. C. A. D.), 41 Fed. (2d) 734	43
National Accident v. Ralstin, 101 Ill. App. 102	10
New Orleans, etc., v. National Rice Mills Co., 234 U. S. 80, 30 S. Ct. 720, 58 L. Ed. 1223	10
New York Central R. Co. v. Ambrose, 280 U. S. 486, 74 L. Ed. 562, 50 S. Ct. 198	30
N. Y. Life Ins. Co. v. Brown (C. C. A. 5), 30 Fed. (2d) 370	10
Parsons v. Bedford, 3 Pet. 433, 7 L. Ed. 732	43
Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 77 L. Ed. 803, 807, 50 S. Ct. 301	30
Preferred Accident Ins. Co. v. Barker (C. C. A. 5), 63 Fed. 158	10
Pryde v. Interstate B. M. A. Asso., 216 N. W. 62, 62 A. L. R. 31	12
Rawlins v. Business M. A. Asso., 204 Mo. App. 670, 220 S. W. 1022	10, 12
Reynolds v. Equitable Accident, 48 Hun. N. Y. 606, 1 N. Y. 738	10
Roch v. Business Men's Protective Asso., 161 Iowa 100	12
R. C. L., Vol. 6, 754, 755	10
Semet Solway v. Wilcox, 143 Fed. 839, 20 Sup. Ct. 704, 202 N. S. 617, 50 L. Ed. 1173	10
Southern Ry. Co. v. Walters, 284 U. S. 190, 76 L. Ed. 230, 52 S. Ct. 58	30
Swendig v. Washington Water Power Co., 265 U. S. 332, 44 S. Ct. 498, 68 L. Ed. 1030	34
Travellers Insurance Co. v. Shepard, 85 Ga. 751, 12 S. E. 18	10, 12
Travellers Insurance Co. of Hartford, Conn., v. Sadie McConkey, 127 U. S. 661, 32 L. Ed. 308	9
Utter v. Travellers Ins. Co., 65 Mich. 545	10, 12
U. S. v. Arzner, 287 U. S. 470, 77 L. Ed. 372, 53 S. Ct. 208	37
U. S. v. Lesher (C. C. A. 9), 59 Fed. (2d) 53	43
U. S. v. Meserve (C. C. A. 9), 44 Fed. (2d) 540	43
U. S. v. Minnesota, 270 U. S. 181, 46 S. Ct. 298, 70 L. Ed. 530	34
U. S. v. Riley (C. C. A. 9), 48 Fed. (2d) 203	43
U. S. v. Thomas et al. (C. C. A. 10), 64 Fed. (2d) 245	43
U. S. v. Tyrakowski (C. C. A. 7), 50 Fed. (2d) 700	20, 24, 43
U. S. v. Wolfman, 61 App. D. C. 52	18
White v. U. S., 270 U. S. 175, 70 L. Ed. 530, 56 S. Ct. 274	37
Wigmore on Evidence (2d Ed.), Volume IV, Par. 2090, p. 450	41

STATUTES, REGULATIONS, ETC.

Act of War Risk Insurance of October 6, 1917, (40 Stat. 400)	27
Bulletin No. 3, of the War Risk Insurance Act, October 10, 1917, Volume 2, Regulations and Procedure of the United States Veterans Bureau, p. 1241 to p. 1273	28, 29
Regulation No. 11 of Treasury Decision 20 W. R.	7, 21
Regulation No. 57, Part 1 (Regulations and Procedure, Bureau War Risk Insurance), November 26, 1920, pp. 54, 55, 56	32

Page

Letter, Honorable W. G. McAdoo, Secretary of Treasury to President of the United States (7/31/8017), Congressional Record of the 65th Congress, Volume 55, p. 3801 27

Treasury Decision 20 W. R. (March 9, 1918), Regulations of the United States Veterans Bureau, Volume 1, p. 9 30

Title 38, Sec. 445, U. S. C. A 2

Title 28, Sects. 702, 703, 705, U. S. C. A 2

United States Veterans Bureau Service Letter, Director's Office (March 7, 1930), Subject: Rating as permanent total of conditions resulting in actual totality which become permanent 35

Modern Problems in Neurology, Dr. S. A. Kinnier Wilson (Pub. Wm. Woods C., N. Y.), p. 19 14

Principles and Practice of Medicine, Sir Wm. Osler (8th Ed.), p. 1085 14

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 152

NEWTON W. LUMBRA, Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER.

Statement of the Case.

This is an action at law brought in the United States District Court for the District of Vermont by Newton W. Lumbra, petitioner, against the United States of America, respondent, for the recovery of benefits upon a War Risk Insurance Policy.

Trial was by jury and a verdict and judgment was rendered in favor of Newton W. Lumbra against the United States of America, for $8,912.50. An appeal from said judgment was taken by the respondent to the Circuit Court of Appeals for the Second Circuit, which reversed the judgment of the district court.

The petitioner was a soldier in the United States Army from 1917 to 1919 and carried a policy of War Risk In-

surance, which lapsed for non payment of premiums on May 1, 1919.

These facts were admitted in Respondent's Answer.

Action was brought by the petitioner under Title 38, Sec. 445 U. S. C. A., which authorizes suits against the United States on policies of War Risk Insurance under Title 28, Sects. 762, 763 and 765 U. S. C. A., known as the Tucker Act.

The question involved was whether or not the petitioner had become permanently and totally disabled within the meaning of the War Risk Insurance Act and Treasury Decision 20 W. R., promulgated pursuant thereto at the date the policy lapsed for non payment of premiums. At the conclusion of the case respondent moved for a directed verdict, which motion was denied. Judgment was entered upon the verdict.

The case was appealed to the Circuit Court of Appeals for the Second Circuit by the respondent, the United States, and said court reversed the judgment of the United States District Court for the District of Vermont in an opinion filed March 6, 1933. The sole ground of the reversal was that as a matter of law the proof of the permanency of petitioner's admitted total disability at the time while his contract was in force was a matter which required expert medical evidence, and because no such evidence was offered, petitioner failed to establish his claim.

The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 63 Fed. (2) 796.

Petitioner was in the trenches with the American Expeditionary Forces in France (R. 20), and on the way to his dugout in the early morning of June 17, 1918, when a high-explosive shell exploded making a crater twenty feet across and ten or twelve feet deep and throwing him to the ground and rendering him unconscious. When he regained consciousness he was very shaken and weak and beads of

perspiration stood out over his body. He remained in the dugout until that night when he was taken to the hospital, where, after first aid treatment was administered, he was later removed to a base hospital. While in the hospital he had fainting, weak spells, dizzy spells, everything would appear black to him, he would perspire freely and he would have to sit down. This condition would occur sometimes once a week and sometimes more often. These spells continued about once or twice a week, becoming worse. Following his discharge from the hospital he returned to his outfit but never joined his company in its active combat but was continuously kept on light duty during the remainder of his time in the Army. At the time of his discharge from the Army he would become dizzy and weak and everything would appear black to him, and he would have to sit down in order to keep from falling. He suffered terrible pains in the head which started in the back and worked over the top of his head, which pains would sometimes continue for a whole day at a time. During 1919 and 1920 he went to Dr. Hunt a number of times to whom he described his condition and he treated him for nerve trouble. He last saw Dr. Hunt in 1921. The nerve spells increased in intensity and frequency as time went on until in 1922, or early in 1923, they became so severe that he would lapse into unconsciousness in these spells, which were becoming more frequent and more severe and would come on sometimes without warning, but at other times (R. 34) he had terrible pains in his head for a day or two preceding the spells. He rested for four months after his discharge (R. 25) and there was a marked change in his appearance upon his return from the Army which was noticed by substantial members of his community and they knew he was suffering from something (R. 66, 73, 74). He seemed to these people like a man who had suffered a

shock and he was complaining of the head pains (R. 107, 117, 144, 69, 79). He was given work by his former employer of the same type as he had before service, but was unable to perform it and was given lighter work. Because he couldn't work half the time (R. 27, 140), he was discharged from this employment. He again rested for a few months on his sister's farm and then secured employment with the Central Vermont Railroad. His work there was changed from time to time, always to a lighter work and there was evidence from several of the officials and fellow employees of the railroad that he was unable to do any of the work to which he was assigned but was kept employed because of their sympathy for him as a wounded ex soldier. His fellow employees did a large part of his work and but for this consideration given him he could not have held his job nor would the railroad have kept him on it (R. 108, 109, 110, 122, 123, 128, 129, 130, 133, 134, 135, 136, 137, 138, 139). He received aid from the American Legion in the form of groceries and wood and that organization paid his rent. From 1926 to the date of the trial he had been in seven hospitals for periods of from two weeks to two months and an attendant was sent with him when going to and from the hospitals; he had been unable to work at all since 1929 though he had tried to secure work but could not because of his condition. There was the evidence of three competent physicians who had seen him in these spells or immediately following them and who had treated him for them and diagnosed them as epilepsy and all three stated that the condition he was in when they saw him was permanent in that they knew of no cure for these attacks. Two of these doctors testified that the condition in which they saw him sometime preceding the trial, was a result of the injury received by him in France.

The case was appealed to the Circuit Court of Appeals for the Second Circuit by the United States, and said court reversed the judgment of the United States District Court for the District of Vermont in an opinion filed March 6, 1933. The question involved in the Circuit Court of Appeals was whether or not there was sufficient evidence of the insured's permanent and total disability at the time his policy lapsed for non payment for the trial court to submit the case to the jury, and the Circuit Court of Appeals for the Second Circuit found that while a jury might properly find that while the term insurance contract in question was in force the insured could not engage continuously in any gainful occupation, and was suffering from total disability, yet the question of the permanency of the insured's total disability was not established by reason of the fact that no expert testimony of such permanence was produced and the petitioner failed to establish his claim because of a lack of such expert testimony.

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that the permanence of a total disability at date of lapsation of policy for non payment of premium was a fact requiring expert evidence.

2. The Circuit Court of Appeals erred in holding that because no expert evidence was produced of the permanence of petitioner's total disability at date of lapsation of policy for non payment of premium, the petitioner failed to establish his claim.

Brief of the Argument.

POINT ONE. The holding that the permanence of a total disability at date of lapsation of policy for non-payment

of premium was a fact requiring expert evidence is in direct conflict with the rule of law of this Court applicable to such cases and with the well settled and universally recognized rule of law as announced in the decision of this and other courts.

Point Two. The requirement of expert evidence in establishing the permanency of a total disability, disregards other competent substantial evidence of permanent disability.

Point Three. The establishment of the fact of permanency under well reasoned and considered decisions of the courts in cases similiar to this, has not been held to require expert opinion.

Point Four. The acts of Congress and the regulations issued by the Executive Branch of the Government pursuant thereto indicate that the permanency of a total disability at date of lapsation of a War Risk Term Insurance contract is determined by the continuation of that total disability over a period of time, which obviously is not a matter requiring expert medical testimony.

Point Five.—The continuation of total disability is a physical fact not requiring the opinion of an expert.

Point Six.—To require expert medical evidence in establishing the permanence of a total disability while a contract of war risk insurance was in force contravenes the rule of liberal construction established by this Court.

Point Seven.—A jury can determine permanent disability without the aid of expert medical testimony.

ARGUMENT.

I.

THE HOLDING THAT THE PERMANENCE OF A TOTAL DISABILITY AT DATE OF LAPSATION OF POLICY FOR NON-PAYMENT OF PREMIUM WAS A FACT REQUIRING EXPERT EVIDENCE IS IN DIRECT CONFLICT WITH THE RULE OF LAW OF THIS COURT APPLICABLE TO SUCH CASES AND WITH THE WELL SETTLED AND UNIVERSALLY RECOGNIZED RULE OF LAW AS ANNOUNCED IN THE DECISION OF THIS AND OTHER COURTS.

In the opinion of the Circuit Court of Appeals the following language was used: "The only one who can offer convincing testimony on such a subject is an expert. Such a person may be able to say that the conditions in May, 1919, were reasonably certain to produce permanent disability. No such evidence was produced and the plaintiff failed to establish his claim because it was lacking." (Cases cited.) "This result is in accordance with the rule laid down in *Clapp* v. *United States*, the opinion of which is filed herewith."

In *Clapp* v. *United States*, the following language is used relative to the need of expert medical testimony: "It was a strictly medical question; without the help of those skilled in the science the conclusions of laymen upon such an issue were without adequate basis and necessarily mere speculation. Only those familiar with the origin and course of the malady were competent to testify and without testimony a verdict stood unsupported."

The two opinions quoted are an interpretation by the Circuit Court of Appeals of the following language in Regulation No. 11, Treasury Decision 20, W. R., March 9, 1918,

relative to the definition of the term "total and permanent disability." "'Total disability' shall be deemed to be 'permanent', whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it." This clause has become in effect one of the clauses of the War Risk Policy issued to the petitioner since the policy was issued subject to such rules and regulations as Congress might adopt and the regulation in question was adopted under specific authority of Congress. The Circuit Court of Appeals, in its ruling relative to medical testimony above quoted, has added a further clause to the regulation so that the regulation coupled with the interpretation of the Circuit Court of Appeals in this case would read: "Total disability" shall be deemed to be "permanent," whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it *provided these conditions are proven by expert medical testimony of such conditions as of date of lapsation of the policy.*

The action of the Circuit Court of Appeals is equivalent to adding to regulation No. 11 a new regulation requiring a particular type of evidence as a condition of recovery. If this were part of the regulation promulgated by the Treasury Department, it would be equivalent to evidential requirements in written contracts which almost universally have not been upheld by the courts. The action of the Circuit Court of Appeals in adding this regulation was error and should not now be upheld. If such a regulation were part of the contract itself the Court would not uphold it and, therefore, since made a part of the contract by the Circuit Court of Appeals it should not now be upheld.

NO PARTICULAR TYPE OF EVIDENCE MAY BE REQUIRED BUT ALL MATERIAL AND RELEVANT

EVIDENCE, WHETHER DIRECT OR CIRCUMSTANTIAL, MUST BE SUBMITTED.

There are several types of contracts in which the contracting parties stipulate as to a rule of evidence or a kind of evidence by which the court must be bound in litigation subsequently arising under such contract. Such stipulations are most common in surety contracts and in insurance policies. They are particularly common in accident and health policies and in such policies there is generally a requirement that an accidental injury must be proved by an eye witness, or by direct and positive proof and numberless variations of these clauses. The courts very generally have not permitted the course of justice upon trials before them to be contracted about in such manner as to defeat the ends to be subserved by such trials. The parties to the contract cannot agree to oust the courts of jurisdiction over such a contract. This Court in passing upon such a clause in an accident policy used the following language: "The requirement, however of direct and positive proof, as to certain matters, did not make it necessary to establish the fact and attendant circumstances of death by persons who were actually present when the insured received the injuries which causes his death * * * The evidence on that point was direct and positive, as much so, within the meaning of the policy as if it had come from one who saw the pistol fired and the proof on this point is none less direct of positive because supplemented or strengthened by evidence of a circumstantial character."

> "While it was not to be presumed, as a matter of law, that the deceased took his own life, or that he was murdered, the jury were at liberty to draw such inferences in respect to the cause of death as, under the settled rules of evidence the facts and circumstances justified." *Travellers Insurance Co. of Hartford, Conn.* v. *Sadie P. McConkey*, 127 U. S. 661.

This case has been favorably commented upon in *Connecticut Mutual Life Insurance Company of Hartford v. Akens* in 150 U. S. in the following language: "And in making out such proof, the plaintiff is entitled to the benefits of the presumption that a sane man would not commit suicide and all other rules of law established for the guidance of courts and juries in the investigation and determination of facts."

Connecticut Mutual Life Ins. Co. of Hartford v. Akens, 150 U. S. 468, 37 L. Ed. 1148.

New Orleans, etc. v. National Rice Mills Co., 234 U. S. 80, 39 Sup. Ct. 726, 58 L. Ed. 1223.

Preferred Accident Insurance Co. v. Barker, 93 Fed. 158 (C. C. A. 5).

Jenkins v. Pacific M. L. Insurance Co., 131 Calif. 121, 63 Pac. 180.

National Accident Society v. Rolstin, 101 Ill. Appeals 192.

Travellers Insurance Co. v. Shepard, 85 Ga. 751, 12 S. E. 18.

Utter v. Travellers Insurance Co., 65 Mich. 545.

Rawlins v. Business M. A. Asso., 204 Mo. App. 679, 220 S. W. 1022

Reynold v. Equitable Accident Co., 48 Hun. N. Y. 605, 1 N. Y. 738.

N. Y. Life Insurance v. Brown, 39 Fed. (2) 376 (C. C. A. 5).

Ruling Case Law in treating provisions in contracts similar to this states the rule to be laid down in *Travellers Insurance Co. v. McConkey* and holds that to be the rule as established by the great weight of authority.

6 R. C. L. 754, 755.

In Charter Oak Life Insurance Co. v. Rodell, the policy required due and satisfactory evidence of the death and of the just claim of the assured under this policy. One objection was to the submission of the case to the jury upon lay evidence of the insanity of the assured. In disposing of this objection the court said "Although such testimony from ordinary witnesses may not have great weight with experts, yet it was competent testimony and expressed in an unartificial way the impressions that are usually made by insane persons upon people of ordinary understanding." It is petitioner's contention in the instant case that while lay witnesses may not have great weight with experts in proving a fact in which a condition of health is involved, nevertheless such testimony was competent testimony and was properly submitted to the jury. If, under the instruction the court has given in this case, the jury was satisfied that the fact was proved then no further requirement should be made by the Circuit Court of Appeals relative to the proof of this fact.

Charter Oak Life Insurance Co. v. Rodell, 95 U. S. 232, 24 L. Ed. 433.

A definitely established rule on contracts requiring a particular type of proof is that any such requirement does not preclude the use of circumstantial evidence or even the reliance wholly upon such evidence, since to exclude these forms of evidence would be to permit the policy to control and abrogate the established rule of law that a contract may be supported by circumstantial evidence in violation of the further rule that such a conflict must be reconciled by adherence to the law and repudiation of the contract provision. The reason given for holding this as an established rule of law in this class of cases in that the courts are not disposed to favor stipulations or agreements, in effect, tending to overthrow the established rules of evidence.

Travellers Ins. Co. v. McConkey, supra;
2 Couch on Insurance, 1512;
7 Couch on Insurance, 5495;
Rawlins v. Business Men's Accident Asso., 204 Mo. App. 679, 220 S. W. 1022;
Roch v. Business Men's Protective Asso., 164 Iowa 199;
Utter v. Travellers Insurance Co., 65 Mich. 545;
Lewis v. Brotherhood Accident Co., 194 Mass. 1;
Pryde v. Interstate Business Men's Accident Asso., Iowa (216 N. W. 62), 62 A. L. R. 31.

A provision requiring direct and positive proof of death in accident policies has been generally held ineffective by the courts and the courts in passing upon such policies have almost uniformly held that all material evidence, whether direct or circumstantial, was properly admissible to determine this fact.

Travellers Insurance Co. v. Shepard, 85 Ga. 751;
Mitchell v. Brotherhood Locomotive F. E., 103 Neb. 791;
Accident Insurance Co. v. Bennett, 90 Penn. 791;
Jenkins v. Hawkeye Comm. Men's Asso., 147 Iowa 113.

Stipulations in contracts making certain evidence competent prima facie, or conclusive evidence of a fact, have generally been held void by the courts as contrary to public policy regardless of the propriety of the policy or motive involved in the particular case.

The Circuit Court of Appeals has, therefore, written into this insurance contract by its holding a clause which, if inserted by the Government, the insurer, would not be upheld by this Court in view of its well reasoned decisions. Since this Court and the majority of courts passing on a provision similar to this in insurance policies have uniformly held that no particular type of proof could be re-

quired except the usual rules of evidence in such cases, the Circuit Court of Appeals erred in setting up such a rule and the question of permanence in this case should be decided on the uniformly recognized and established rules of evidence. It is respectfully contended that since the Circuit Court of Appeals found no error in the evidence as submitted under recognized rules, the judgment of the district court should be affirmed.

II.

THE REQUIRING OF EXPERT TESTIMONY IN ESTABLISHING THE PERMANENCY OF A TOTAL DISABILITY DISREGARDS OTHER COMPETENT SUBSTANTIAL EVIDENCE OF PERMANENT DISABILITY.

Motion was made by the respondent for a directed verdict at the close of the case in the district court, based upon the alleged general insufficiency of the evidence to establish total and permanent disability, which motion was overruled by the trial court and the jury found for petitioner. The Circuit Court of Appeals in its opinion indicated that while there was sufficient evidence of the totality of petitioner's disability in 1919, there was no sufficient evidence of its permanency, and for this sole reason reversed the action of the lower court.

That the party, against whom the motion for a direct verdict is made, is entitled to the most favorable aspect of the evidence and all reasonable inferences to be drawn therefrom, is too well settled to merit argument and with such fact in mind it is necessary to consider the evidence adduced on behalf of the petitioner in determining what inferences can be indulged in from that evidence.

The Circuit Court of Appeals in its opinion said:

> "In the present case a jury might find that in May, 1919, the insured could not engage continuously in any gainful occupation."

Thus it will be seen that the Circuit Court of Appeals held that there was sufficient evidence of the totality of the disability. This leaves us with the question only of the permanency of that disability and whether there is any substantial evidence, or reasonable inference therefrom, upon which the jury could proceed to find that such disability was permanent.

Lambra was suffering from epilepsy. In view of the nature of this disability even the medical profession must have facts seldom found on personal examination in order to even make a diagnosis, without even considering a prognosis, which must necessarily follow the diagnosis.

Dr. S. A. Kinnier Wilson, one of the two foremost neurologists of England, in his recently published collection of essays on "Modern Problems in Neurology" (William Wood & Co., New York) at page 19 states:

> "In the course of practice cases come under notice which present intimate or remote similarities to the phenomena of epilepsy as usually understood, but which do not seem to resemble each other, at least not superficially. For the data in many instances one has to rely on descriptions furnished by either the patient or his friends (there is no reason, of course, to doubt these descriptions are veridical) since development of symptoms during consultation and examination seldom occurs."

Sir William Osler (8th Edition) on the "Principles and Practice of Medicine" with reference to the prognosis of epilepsy, at page 1085 states:

> "Prognosis.—This may be given today in the words of Hipocrates: 'The prognosis in epilepsy is unfavor-

able when the disease is congenital, and when it endures to manhood, and when it occurs in a grown person without any previous cause * * *. The cure may be attempted in young persons, but not in old.' ''

Walter E. Bell testified that he was a corporal in Lumbra's platoon, seeing him at least twice daily and oftener and before he was injured he knew of him having no physical disabilities and with Lumbra went through the same barrage that injured Lumbra (R. 44).

Captain R. H. Pollard testified that he was a sergeant and present when the bombardment took place in which Lumbra was injured; that he saw Lumbra on his return home at which time he noticed a change; as when Lumbra entered the service as a recruit he was a husky lad, looked like a country boy full of life and ready to do anything and the way he appeared on board ship on his return home he didn't care much about what happened, appeared listless, lifeless and didn't appear the same, but it was a marked change (R. 61).

Cordes M. Foley (R. 65) testified that he knew Lumbra since he was a very small boy at which time he was a normal healthy boy full of fun and jokes and was active and performed his work satisfactorily before he entered the army; and that shortly after his return home (R. 66) he noticed that Lumbra was more sober and slow; his face was more flushed than it was when he enlisted and he was not as active as before; and he appeared tired; that he did try to work at different times and places (R. 67); and after his return (from France) he was around the village more than before; and that in (R. 69) 1920 or 1921 Lumbra complained of headache and backache.

Charles H. Dow (R. 72) testified that he knew the insured since 1913 and that the insured worked under him in 1916, at which time he appeared to be a good rugged

man and his work was satisfactory, working at heavy work (R. 73); that in 1919 Lumbra worked for him for a short time but he didn't work very long because he was unsteady and they didn't keep him on the job although they tried him at other places; that he was not as good a worker as before; that he was not the same kind of man; and wasn't capable of doing the work and as petitioner did not work every day they didn't keep him, and finally discharged him because of his unsteadiness; he testified that petitioner complained of not being well and he, too, noticed a change in petitioner after his return home after the war.

Louis J. Paquette testified that he knew petitioner Lumbra since 1924 at which time the witness was commander of the American Legion in which capacity he investigated petitioner's case and found he needed help and had him sent to the hospital and had his family taken care of temporarily, by buying for them groceries, paying their rent and buying coal; that for a period of two years (R. 77, 78) Lumbra was not working steadily and in 1931 he saw Lumbra have an epileptic fit, at which time he breathed heavily, frothed at the mouth and looked like a dead person; that the witness was an employer of men (R. 79) and knew of no work that Lumbra could do with safety.

Mitchell Brissette (R. 105) testified for petitioner that before the war the petitioner worked for him handling an axe and a cross-cut saw cutting logs, working from 8½ to 10 hours a day, at which time he was very steady, a very good rough workman, very rough and rugged and as strong as a bear, in the winter of 1915-16 (R. 106); that (R. 107) he became closely acquainted with the petitioner in July, 1922, while working for the railroad (R. 108) and saw him at noon time, at night, or in the morning; that petitioner lost much time and would have spells and that when he returned to work after the spells (R. 109) he acted like a man after a long illness; that he knew petitioner

was receiving special consideration and guessed "they" must have known that he was an ex-service man or something in order for him to have held his job and that "they" were excusing him for some such reason.

Mrs. Florence Lambra testified that she married the petitioner in December 1922 and about three months later he had a fit early in the morning (R. 111.); that she heard him groan and that he fell to the floor and was unconscious for from ten to fifteen minutes and that he didn't go to work until a few days thereafter; and that these "fits" continued from that time on, he having from two to five a month (R. 112.); that in February 28, 1929, he was dismissed from his employment, having had six fits between the hours of 6 and 7 in the morning; and as a result of her talking with the doctor, learned that these fits were epileptic fits.

The foregoing evidence particularly when considered with the evidence given by the insured as set forth in the "Statement of Case" appearing on pages 1-5 hereof, it is respectfully submitted was substantial evidence which when considered by the jury together with all inferences to be drawn therefrom was sufficient to support the jury's verdict.

The requirement that this disabled war veteran and others similarly situated must produce expert medical opinion of physicians who examined them while their contracts of insurance were in full force and effect, will work an insurmountable hardship and act to preclude deserving world war veterans suffering from service-incurred disabilities from realizing upon their insurance, disability instalments when that money is most needed. When they paid their monthly premiums on this insurance they did so with the belief that they would be protected in the event of disaster. This veteran and others suffering from war injuries are now dependent to some degree, at least if not entirely, upon

local charity for their support and the support of their families. They were usually without the means with which to pay for medical attention while their contracts of insurance were in force. Nevertheless they carried on, manfully striving to regain their places in the ranks of the workers of the world and carry on after the expiration of the national emergency created by the World War, and hoping all the time that their physical conditions would improve. Some were successful, but others were not and it is this latter class of unfortunate, disabled World War veterans whose disabilities in the majority of instances were incurred in the line of duty serving their country, that find themselves now met with this rule of law enunciated by the Circuit Court of Appeals in this case.

The spirit of this legislation as shown by its history and the subsequent regulations issued pursuant thereto as set forth in Point IV hereof, as well as the liberal construction placed upon similar cases by this Court as set forth in Point VI hereof, is contravened by this opinion of the Circuit Court of Appeals.

We respectfully submit that the action of the Circuit Court of Appeals in this case indicated that it weighed the evidence and decided for itself the weight to be given thereto.

It has been recently held by the courts that the ability of a person to do particular work may properly be proven by other than expert testimony.

In the case of *U. S.* v. *Woltman*, 61 Appeals D. C. 52, a War Risk Insurance case, the jury returned a verdict for the insured and the question raised by appeal was whether it was sufficient evidence of total and permanent disability under the War Risk contract on or before the insured's discharge from military service to take the case to a jury. The Government contended in its assignments of error that

the evidence of certain non professional witnesses who were permitted to express an opinion as to the ability of the insured to follow a gainful occupation was erroneously admitted in evidence. The Court of Appeals of the District of Columbia held:

> "The evidence shows the witnesses were in a particularly favorable position to observe the insured and got their knowledge of his ability to work from conditions which were visible to an ordinarily intelligent observer and which were not of that character requiring professional diagnosis. It is always proper to permit an unprofessional witness, who has had opportunity to observe a sick or injured person, to express an opinion with respect to whether such a person is helpless or unable to work. The value of the opinion depends, of course, upon the intelligence of the witness and his opportunity to know of the condition as to which he testifies and the ordinary effect of such a condition. In this case the groundwork was sufficiently laid, and we think the evidence was properly received."

In the case of *Semet Solway* v. *Wilcox*, 143 Fed. 839, Circuit Judge Dallas in the Circuit Court of Appeals for the Third Circuit (certiorari denied 26 Sup. Ct. 764, 202 U. S. 617, 50 L. Ed. 1173), the question involved was whether or not plaintiff had been discharged from employment, plaintiff contending that because of his physical condition he was unable to do the work. The employer raised the point as to whether plaintiff should have been permitted to testify that at the time of his alleged discharge he was unable to perform the duties of his employment. This testimony was not as to the nature of his disease or any other matter about which in the absence of special learning or experience he might not have been qualified to speak. It was as to his ability, notwithstanding the state of his health, to do the work he had been employed to do. The court held that:

"Upon that subject no one could have been better informed than himself. * * * It may be confidently affirmed that a witness may always testify to any relevant fact which he has perceived by any of his senses and that his impressions respecting facts so perceived are not in every case to be excluded as being merely opinions. * * * The plaintiff's statement of his capability to discharge the duties he had assumed may, in a sense, be taken to import nothing more than that it was his impression or belief on the subject; but his impression, if impression it should be called, was at least based upon facts which he personally knew and therefore was itself a fact which the jurors were entitled to consider though they might deem it to be of but little weight. * * * There are some matters of which every man, with ordinary opportunities of observation is able to form a reliable opinion." (*Ardeso Oil Co.* v. *Gilson*, 63 Pa. 151); and the ability of the plaintiff to do the particular work which he had engaged to do was certainly a matter of which he had more than ordinary knowledge and upon which he was especially competent to form a correct judgment. That question was not one that could be determined only upon scientific theory, or by abstract reasoning, and the opinion of the plaintiff respecting it, being founded upon facts within his own knowledge and experience, is no less reliable than had he appeared to be an "expert" in the too restrictive sense in which that term has been sometimes, but not always, used. (*D. & C. Steam Towboat Co.* v. *Stars*, 69 Pa. 41).

See also *U. S.* v. *Tyrakowski*, (C. C. A. 7), 50 Fed. (2d) 766; *Malavski* v. *U. S.* (C. C. A. 7), 43 Fed. (2d) 974; *Carter* v. *U. S.* (C. C. A. 4), 49 Fed. (2d) 221; *Madray* v. *U. S.* (C. C. A. 4) 55 Fed. (2d) 552.

III.

THE ESTABLISHMENT OF THE FACT OF PERMANENCY UNDER WELL-REASONED AND CONSID-

ERED DECISIONS OF THE COURTS IN CASES SIMILAR TO THIS, DOES NOT REQUIRE EXPERT OPINION.

The opinion of the Circuit Court of Appeals in this case makes it incumbent upon the insured to prove that the permanency of his total disability was known and recognized from the very inception of the disability. This we respectfully submit is not the law.

The definition of total and permanent disability is set forth in Regulation No. 11 of Treasury Decision 20, W. R. as follows:

> "Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantial gainful occupation shall be deemed, * * * to be total disability.
>
> "'Total Disability' shall be deemed to be 'permanent' whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it."

This regulation does not require that the disability be certain to be permanent or that it be known that it absolutely will continue throughout the lifetime of the person suffering from it, but requires only that it be shown to be founded upon conditions *reasonably certain* to continue throughout the life of the person suffering.

As applied to a case involving epilepsy, it must be considered that the response to treatment, or the failure to respond to treatment, are material matters in arriving at a prognosis, and it is only after the treatment has been administered and the patient has been under observation that a fair prognosis can be made. Consequently, observation and continuation of a disease are not only of material aid, but are absolutely necessary in arriving at a proper prognosis, and to require a certain prognosis of permanency at

the day the disability first makes itself known, would pass on to this petitioner an impossible burden. Even physicians must have the benefit of the subsequent development of his disease; and it seems anomalous to say that if he has had the benefit of observation and has conclusively shown his total disability to be permanent by reason of the lapse of time to say that such total disability has not been permanent since its inception.

In the case of *Barksdale* v. *United States*, (C. C. A. 10), 46 Federal (2d) 762, which was a war risk insurance suit, the question of total and permanent disability, in a war risk term insurance case, was held to be a question for the jury *notwithstanding the plaintiff's own medical evidence to the effect that he was not permanently disabled* where his own testimony showed a continued inability to follow continuously any occupation.

The decision of the Circuit Court of Appeals in the instant case requiring expert evidence is in conflict with the rule adopted in other circuits.

In *Malarski* v. *United States*, (C. C. A. 7), 43 Fed. (2d) 974, which was a war risk insurance suit, the lower court directed a verdict for the defendant, but the Circuit Court of Appeals reversed this action and remanded the case for a new trial.

In that case a physician examined the insured in February, 1921, and found him afflicted with tuberculosis and again examined him in 1929, finding chronic quiescent tuberculosis. The physician was of the opinion that, considering the insured's condition when first examined in February, 1921, he had been afflicted with active tuberculosis for eighteen months or two years prior to that time and the disability found in 1921 was a permanent one which could not have developed in from less than one to two years.

In the case of *Madray* v. *United States*, 55 Fed. (2d) 552, a war risk insurance suit, the only question was whether the trial court was correct in directing a verdict in favor of the Government. The only testimony submitted was that of the insured himself, his mother, his brother and a friend, who had relatively slight acquaintance with him. NO MEDICAL TESTIMONY WHATEVER WAS OFFERED. In directing a verdict the trial judge remarked:

> "There has not been a single doctor to testify about his condition, not a single expert, nothing here except to show that the man was nervous and discharged for psycho-neurosis from the army and therefore under the facts in the case I will have to direct a verdict for the United States."

The Circuit Court of Appeals for the Fourth Circuit reversed the action of the trial court and with respect to permanency said:

> "Similarly on the question of whether the disability is permanent as well as total, since each case is to be put to the test of whether the conditions upon which the claims of permanency are based, render it reasonably certain that the disability will continue throughout the life of the person suffering from it, it follows that it must be left to the jury to determine the probative value of such evidence as has been submitted on this case."

Likewise in the case of *Carter* v. *United States* (C. C. A. 4), 49 Fed. (2d) 221, a war risk insurance suit, the court speaking through Senior Judge John J. Parker, said:

> "(4) And we think that under the evidence here the permanency as well as the totality of the disability was a question for the jury. A disability is permanent 'whenever it is founded upon conditions which render

it reasonably certain that it will continue throughout the life of the person suffering from it'; and where there is substantial evidence of such conditions it is for the jury to say whether or not the disability in fact exists."

In the case of *United States* v. *Tyrakowski* (C. C. A. 7) 50 Fed. (2d) 766, the only question before that court was whether there was any substantial evidence in the record to support the finding of total and permanent disability made by the lower court. In that case the insured was discharged June 14, 1919, and he first consulted a doctor July 28, 1919, by the name of Buchanan who sent him to the Veterans' Bureau. He next consulted a doctor in 1924 who likewise referred him to the Veterans' Bureau, and he next attempted to call on a doctor in 1927 at the Veterans' Bureau but was not examined. Dr. Buchanan examined the insured casually May 28, 1930, and said that based upon the examination thus obtained it would be injurious for the plaintiff to work at indoor or hard work and that such condition most likely must have existed since his first examination on July 28, 1919, although he did not really know. The only direct evidence as to insured's condition on July 31, 1919, was that of himself, his sister and Dr. Buchanan. That of the last two witnesses named was almost negative in effect so the only question presented was whether or not there was substantial evidence submitted to the effect that insured was totally and permanently disabled on or before July 31, 1919.

The court in that case held that insured's testimony alone prevented the court from answering this question in the negative in view of the Treasury Department's definition of total and permanent disability. The court stated: "From the date of his discharge we find him making practically the same complaint as to pain and suffering and the

doctors will not entirely agree as to this ailment. He testified positively that he was not able to work continuously and for that reason he was unable to hold a position for any appreciable length of time. * * * Practically all of the evidence except his own deals with his condition at a much later date than August 31, 1919. It was competent as bearing upon the matter of permanency and must be considered as substantial. * * * Of course they" (the physicians) "did not attempt to say that these diseases or any of them were present on August 31, 1919. * * * *But regardless of the doctor's testimony* appellee says that he was suffering on the trial date in the same manner but in a greater degree as he was on August 31, 1919. He does not attempt to classify his disease but may, and it is not necessary for him to do so. Neither is it necessary for him to trace its cause." The court held this was properly a jury question.

In a case involving the mental condition of the insured, *Connecticut Mutual Life Insurance Co.* v. *Lathrop,* 111 U. S., 612, 28 L. Ed. 536, a domestic in the family testified that "He looked wild and frightened out of his eyes; he looked like someone that was crazy." To another witness he appeared to be "out of his head; kind of mad; insane." And there was other testimony of a similar character. This Court stated:

> "Counsel for the plaintiff in error contends that witnesses who are not experts in medical science may not, under any circumstances, express their judgment as to the sane or insane state of a person's mind. This position, it must be conceded, finds some support in some adjudged cases as well as in some elementary treatises on evidence. But, in our opinion, it cannot be sustained consistently with the weight of authority, nor without closing an important avenue of truth in many, if not in every case, civil and criminal, which

involves the question of insanity. Whether an individual is insane, is not always best solved by abstruse metaphysical speculations, expressed in the technical language of medical science. The common sense and, we may add, the natural instincts of mankind, reject the supposition that only experts can approximate certainty upon such a subject. There are matters of which all men have more or less knowledge, according to their mental capacity and habits of observation; matters about which they may and do form opinions, sufficiently satisfactory to constitute the basis of action. * * * The extent to which such opinions should influence or control the judgment of the court or jury must depend upon the intelligence of the witness, as manifested by his examination, and upon his opportunities to ascertain all the circumstances that should properly affect any conclusion reached."

Connecticut Mutual Life Insurance Co. v. *Lathrop,* 111 U. S. 612, 28 L. Ed. 536.

The question of permanence must either be determined by a prognosis or a continuation of the fact of the existence of the disability. The rule announced by the Circuit Court of Appeals in the instant case is apparently in conflict with the rule of this Court in the case of *Connecticut Life Insurance* v. *Lathrop, supra.*

IV.

THE ACTS OF CONGRESS AND THE REGULATIONS ISSUED BY THE EXECUTIVE BRANCH OF THE GOVERNMENT PURSUANT THERETO INDICATE THAT THE PERMANENCY OF A TOTAL DISABILITY AT DATE OF LAPSATION OF A WAR RISK TERM INSURANCE CONTRACT IS DETERMINED BY THE CONTINUATION OF THAT TOTAL DISABILITY OVER A PERIOD OF TIME, WHICH OB-

VIOUSLY IS NOT A MATTER REQUIRING EXPERT MEDICAL TESTIMONY.

Long prior to the enactment of the amendments to the original War Risk Insurance Act, granting insurance to the armed forces of the United States during the late World War, which amendments were enacted on October 6, 1917, the question of insurance was prominently in the minds of the executive officers of the United States, and in this connection we quote from the letter of the Honorable W. G. McAdoo, then Secretary of the Treasury, to the then President of the United States, written July 31, 1917, and which was incorporated in the Congressional Record of the 65th Congress, Volume 55, page 6901, as follows:

> "We are not relying upon the volunteer system in this war. We are drafting men and compelling them to make, if necessary, the supreme sacrifice for their country. A higher obligation rests upon the government to mitigate the horrors of war for the fighting men and their dependents, insofar as it is possible to do so, through compensation, indemnities, *and insurance*. Less than this a just, generous, and humane government cannot do. We must set an example to the world, not alone in the ideals for which we fight, but in the treatment we accord to those who fight and sacrifice for us."

This was an expression by the Secretary of the Treasury who was to have and did have the administration of the War Risk Insurance Act, until the Veterans Bureau was created by an Act of Congress on August 9, 1921.

Mr. McAdoo was not merely expressing the sentiments of an executive officer of the Government, but the ideals and sentiments of the American people.

The Act of War Risk Insurance of October 6, 1917 (40 Stat. 409), provided that war risk insurance was to

be granted to members of our armed forces against the death or total and permanent disability of the insured, and provided among other things:

> "SEC. 400. That in order to give every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) * * * *greater protection for themselves and their dependents,* * * * the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000, or more than $10,000, upon the payment of the premiums as hereinafter provided."
>
> "It shall be payable only to spouse, child, grandchild, parent, brother, or sister, and also during total and permanent disability to the injured person, or to any or all of them" (40 Stat. 409).

The Act of October 6, 1917, was drafted by a committee selected for that purpose and the Honorable Julian W. Mack, for many years a distinguished member of the Circuit Court of Appeals for the Seventh District, who was known as a national figure not only because of his judicial attainments but because of his ability as an instructor in the law, served as Chairman of the Committee that drafed the War Risk Insurance Act. As early as October 16, 1917, a conference was called at Washington, D. C., at which conference the Honorable Julian W. Mack presided, it being a conference between Mr. Mack, the man who drafted the War Risk Insurance Act, and such members of the United States Army as could attend. The result of this conference was published as Bulletin No. 3 of the War Risk Insurance Act under date of October 16, 1917, and is to be found in Volume 2 of the Regulations and Pro-

cedure of the United States Veterans' Bureau at page 1241 to page 1273. This Bulletin is entitled:

> "Explanation submitted by the Honorable Julian W. Mack of the provisions of the military and naval insurance act presented at a conference of officers and enlisted men of the army and navy held in Washington on October 16, 17, and 18, 1917. This explanation has the full approval of the Bureau of War Risk Insurance.
>
> WILLIAM C. DELANOY,
> *Director.*
>
> Approved:
> W. G. MCADOO,
> *Secretary of the Treasury.*"

In that conference, the Honorable Julian W. Mack stated in regard to war risk insurance:

> "Then, another provision that the Government generously added: While it based the premiums upon these extremely low term rates, it added to this provision that not only on a man's death should the policy mature, but also on his becoming totally and permanently disabled. This has nothing at all to do with the compensation provision. You pay nothing for that. The compensation is given only if the injuries are received in the line of duty. Your insurance against total disability or death is against total disability or death, no matter how it arises or when it arises, whether in the service or out of the service, because of the service or not because of the service. It is like insurance in any private company and covers all contingencies. But, as I say, added to the life insurance, the Government throws in for good measure the provision that if before death you become totally and permanently disabled, the policy will then become due." (Bulletin No. 3, Bureau of War Risk Insurance, Volume 2, Regulations and Procedure, U. S. Veterans Bureau, at page 1258.)

At this same conference, a member of the conference asked Judge Mack the following question:

> "Your statement, Judge, of total permanent disability—suppose a man is pronounced totally and permanently disabled by a board of physicians and thereafter is develops that he has recovered somewhat. Would he still be considered under that condition, or would that word "permanent" come in, and if so, what is the effect?
>
> Judge Mack: That is a problem.
>
> A Member: That's got to be settled.
>
> Judge Mack: And I think the Bureau will settle the problem liberally." (Bulletin No. 3, Bureau of War Risk Insurance, Volume 2, Regulations and Procedure, U. S. Veterans' Bureau, at page 1265.)

The Bureau did settle the problem liberally by issuing Regulation No. 11, which was promulgated March 9, 1919, and which to this day has never been cancelled, modified or repealed so far as defining total and permanent disability for insurance purposes; it follows:

(Treasury Decision and 20, W. R.) Total Disability.

Regulation No. 11 relating to the Definition of the term "Total Disability" and the determination as to when "Total Disability shall be deemed permanent.

Treasury Department, Bureau of War Risk Insurance.

Washington, D. C., March 9, 1918.

By virtue of the authority conferred in Section 13 of the War Risk Insurance Act the following regulation is issued relative to the definition of the term "total disability" and the determination as to when total disability shall be deemed permanent:

"ANY IMPAIRMENT OF MIND OR BODY WHICH RENDERS IT IMPOSSIBLE FOR THE DISABLED PERSON TO FOLLOW CONTINUOUSLY ANY SUBSTANTIALLY GAINFUL OCCUPATION SHALL BE DEEMED, IN ARTICLES III AND IV TO BE TOTAL DISABILITY.

"'TOTAL DISABILITY' SHALL BE DEEMED TO BE 'PERMANENT' WHENEVER IT IS FOUNDED UPON CONDITIONS WHICH RENDER IT REASONABLY CERTAIN THAT IT WILL CONTINUE THROUGHOUT THE LIFE OF THE PERSON SUFFERING FROM IT.

"WHENEVER IT SHALL BE ESTABLISHED THAT ANY PERSON TO WHOM ANY INSTALLMENT OF INSURANCE HAS BEEN PAID AS PROVIDED IN ARTICLE IV ON THE GROUND THAT THE INSURED HAS BECOME TOTALLY AND PERMANENTLY DISABLED, HAS RECOVERED THE ABILITY TO CONTINUOUSLY FOLLOW ANY SUBSTANTIALLY GAINFUL OCCUPATION, THE PAYMENT OF INSTALLMENTS OF INSURANCE SHALL BE DISCONTINUED FORTHWITH, AND NO FURTHER INSTALLMENTS SHALL BE PAID SO LONG AS SUCH RECOVERED ABILITY SHALL CONTINUE."

WILLIAM C. DeLANOY, Director.

Approved:
W. G. McADOO,
Secretary of the Treasury.

Regulations and Procedure United States Veterans Bureau, Part 1, Page 9.

It will be noted that Regulation No. 11 recognized the fact that one who was considered totally and permanently

disabled could recover his ability to follow a substantially gainful occupation, thus dispelling the idea of a fixed permanency as meaning forever or unending.

As early as November 26, 1920, the Bureau of War Risk Insurance recognized that the inability to engage continuously in an occupation for a period of six months raised a presumption of permanent total disability and promulgated Regulation No. 57 (subsequently cancelled), wherein it was provided under Subdivision B. thereof:

> "The procedure in making permanent total disability ratings for purposes of insurance, or compensation, or both shall be as follows:
>
> * * * * * * *
>
> "Where the disabled person on the date of the issuance of this regulation or hereafter shall be either an inmate of a hospital or asylum during a continuous period of six months or more, or on the date of this regulation is or hereafter shall be rated as totally disabled or totally and temporarily disabled for a continuous period of six months or more and be unable to follow continuously any substantially gainful occupation during such six months, and in addition at the time of the medical examination hereafter prescribed, shall be found to be in such physical or mental condition as to require further hospitalization or otherwise unable to follow continuously any substantially gainful occupation."
>
> Regulation No. 57, Part I, Regulations and Procedure, U. S. Veterans Bureau, Page 54.

Subdivision 8 of Regulation 57 provides as follows:

> "All terminations of an existing total permanent disability award for compensation and insurance purposes and all reductions thereof shall be effective the last day, inclusive, of the month in which the revised award is made, regardless of the date of the revised

rating. When an award of total permanent disability is terminated under a contract of insurance, the insured should be forthwith notified of the fact and advised that his premium must henceforth be paid if the remaining insurance is to continue in force, and advised of the amount and due date of the monthly premium, and shall be allowed the usual grace period of 31 days from the effective date of the discontinuance of such total and permanent disability payments under the contract of insurance."

A clear import of this regulation is that any one who had a continuous disability for a period of six months and at the end of the six months was unable to follow continuously any substantially gainful occupation should be rated as permanently and totally disabled.

On March 7, 1930, the following regulation or regulatory order relating to the question of "permanency" was issued by Frank T. Hines, then Director of the United States Veterans' Bureau for the observance and guidance by all employees of all stations in that Bureau:

"UNITED STATES VETERANS' BUREAU SERVICE LETTER
DIRECTOR'S OFFICE

March 7, 1930.

Subject: RATING AS PERMANENT TOTAL OF CONDITIONS RESULTING IN ACTUAL TOTALITY WHICH BECOME PERMANENT.

1. For the information and guidance of the rating and appellate authorities of the Bureau, there is attached a copy of the opinion, dated May 15, 1929, of the General Counsel, in the cases of John A. Duggan, XC-292, 238, and William V. Oxley, C-249, 512, which have been approved by the Director.

2. This decision authorizes a determination that permanent totality was in fact existent from the inception of actual totality in those cases where an actual

total disabling effect, shown to have existed uninterruptedly, terminates in a recognized permanent totality or death * * *.

(S) FRANK T. HINES,
Director.

To All Stations."

The rule thus promulgated has been used by officials of the Veterans' Administration in administratively granting for insurance as well as compensation purposes, retroactive permanent ratings effective from the inception of the total ratings when an actual total disabling condition, shown to have existed uninterruptedly, terminates in a recognized permanent totality or death.

In the instant case as we read the decision of the Circuit Court of Appeals it is admitted that the recognized total disability did actually terminate in a recognized permanent total condition.

This order, retrospective in effect by its language and as applied administratively, has been in force for over three years and was never specifically rescinded or cancelled by the Veterans' Administration.

It is urged that as this construction of the word "permanent" has been followed by the executive agency charged with the administration of this law for a considerable period of time, that it should not be disturbed except for very cogent reasons. See *Swendig* v. *Washington Water Power Company*, 265 U. S. 332; 44 S. Ct. 496; 68 L. Ed. 1036.

We urge that the long continued and uniform practice of those officials charged with the duty of administering this regulation is persuasively determinative of its construction. *U. S.* v. *Minnesota*, 270 U. S. 181; 46 S. Ct. 298; 70 U. S. L. Ed. 539.

We therefore urge, as petitioner's "total disability" (inability to follow continuously any substantially gainful

occupation) ripened into a permanent total disability, then under this regulation of March 7, 1930, the insured was *permanently and totally* disabled *ab initio* as of the onset of the total disability (May, 1919); and the permanent rating should cover the entire period of petitioner's total disability.

See—United States Veterans' Bureau Service Letter, Director's Office, March 7, 1930, Subject: "Rating as Permanent Total of Conditions Resulting in Actual Totality which Become Permanent."

V.

THE CONTINUATION OF TOTAL DISABILITY IS A PHYSICAL FACT NOT REQUIRING THE OPINION OF AN EXPERT.

Considerable weight must be given to the fact that the disability in this case has been a fact for a period of over fifteen years and it is recognized in the opinion of the Circuit Court of Appeals for the Second Circuit that petitioner's disability was total while the contract was in force. In their opinion they said:

> "In the present case a jury might find that in May, 1919, the insured could not engage continuously in any gainful occupation."

The disease from which the insured was suffering being total within the meaning of the insurance contract herein sued upon from its inception, we respectfully submit that the physical fact of its continuation for fifteen years was evidence to consider as to whether it was a permanent disability.

Its continuation over these years has been a physical fact. It is not necessary to indulge in speculation, nor to resort to the opinion of an expert to determine that un-

deniable fact. It has been held by this Court, in many cases, that opinion evidence, and even positive testimony, must give way to a physical fact in contradiction thereto, and that a verdict based upon testimony or opinion, as here, which testimony or opinion is positively contradicted by the existence of a physical fact, cannot stand; as has very recently been said by this Court:

> "'A rebuttal inference of fact' must yield necessarily to credible evidence of the actual occurrence." *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333; 77 L. Ed. 503, 507; 50 S. Ct. 391.

See also:

Gulf M. & N. Co. v. *Wells*, 275 U. S. 455; 72 L. Ed. 370; 48 S. Ct. 151.

Kansas City Southern R. Co. v. *Jones*, 276 U. S. 303; 72 L. Ed. 583; 48 S. Ct. 308.

New York Central R. Co. v. *Ambrose*, 280 U. S. 486; 74 L. Ed. 562; 50 S. Ct. 198.

Atchison, T. & S. F. R. Co. v. *Toops*, 281 U. S. 351; 74 L. Ed. 896; 50 S. Ct. 281.

Southern Ry. Co. v. *Walters*, 284 U. S. 190; 76 L. Ed. 239; 52 S. Ct. 58.

All of the foregoing cases came before this Court on certiorari upon the single question of the sufficiency of the evidence to establish the alleged facts and in each instance it was found by this Court that the testimony in support of the allegations was contradicted by physical fact and that the verdicts could not stand.

In the instant case we have the existence of a physical fact, *viz.*, the existence of this disability over a period of fifteen years. Consequently, the action of the Circuit Court of Appeals in this case in determining a fact contrary to the physical fact after a jury verdict was rendered for the

petitioner constituted an invasion of the province of the jury and such action by the Circuit Court of Appeals is in direct contravention to the constitutional guarantee of trial by jury.

In the case of *Connecticut Mutual Life Insurance Co.* v. *Lathrop*, 111 U. S. 612; 28 L. Ed. 536, the Court said:

> "The common sense, and, we may add, the natural instincts of mankind, reject the supposition that only experts can approximate certainty upon such a subject."

VI.

TO REQUIRE EXPERT MEDICAL EVIDENCE IN ESTABLISHING THE PERMANENCE OF A TOTAL DISABILITY WHILE A CONTRACT OF WAR RISK INSURANCE WAS IN FORCE CONTRAVENES THE RULE OF LIBERAL CONSTRUCTION ESTABLISHED BY THIS COURT.

The Circuit Court of Appeals in holding that the permanence of a total disability at date of lapsation of policy for non-payment of premiums was a fact requiring expert evidence denies the liberality of the construction of the terms of War Risk Insurance policies which this Court has held to be applicable. *White* v. *United States*, 270 U. S. 175; 70 L. Ed. 530; 46 S. Ct. 274; *United States* v. *Arener*, 287 U. S. 470; 77 L. Ed. 372; 33 S. Ct. 238.

VII

A JURY CAN DETERMINE PERMANENT DISABILITY WITHOUT THE AID OF EXPERT MEDICAL TESTIMONY.

We regard the rule of law laid down by the court below, to the effect that from all the evidence in the case the jury

could not determine whether or not the petitioner's disability was permanent at a time when his policy was in force, as unsound, contrary to the fundamental principles of our jury system of trial, and a surrender of the powers vested in the judiciary to the medical profession. We further believe that the court below was announcing facts as a rule of law when it said:

> "They and we manifestly know nothing about it, and the plaintiff's case was not established by proof that epilepsy finally ensued. The only one who can offer convincing testimony on such a subject is an expert. Such a person may be able to say that the conditions in May, 1919 were reasonably certain to produce permanent disability."

We believe it contrary to our system of jurisprudence and inimical to our American institutions for any court to lay down as an absolute unchanging rule that in any particular type of cases the courts are absolutely dependent upon any particular profession for information, and particularly the medical profession (as much as we respect it). This is especially true, because the practice of medicine, while involving the elements of science, is not a science but an art; and we believe that there are many cases involving war risk insurance, in which, where total disability while the policy was in force is admitted, as apparently it was in the instant case, the jury is just as competent to determine from the conditions existing at that time and from subsequent events as to whether the disease or injury was permanent, as a doctor.

Conceding that the opinions of experts may be of great help in making a prognosis at a given time, we do not believe that such opinions are the *sine qua non* of substantial evidence. For example, suppose that a veteran had one leg shot off and an injury to his shoulder, and has spent the

greater portion of his time since discharge in hospitals, and that he has had draining sinuses in both his leg and shoulder and numerous operations thereon and that he was an illiterate laborer. Would anyone contend that it would take a prognosis by a doctor as of the time of his discharge from the army that he was totally and permanently disabled at the time to take the case to the jury? Or suppose that during battle a soldier became obsessed with the idea that he was President of the United States, showed suicidal tendencies, did not recognize his close friends, had hallucinations to the effect that he was the inventor of the telegraph, the radio and the steamship, and on his return to this country was adjudged insane and confined to an asylum where he has ever since remained with a diagnosis of *dementia praecox*. Would it take a doctor in that case to give a prognosis as to the permanency of his condition at the time of discharge in order to take such a case to the jury under the statutes, regulations and decisions relating to war risk insurance? Numerous other illustrations occur to us and demonstrate conclusively the unsoundness of the rule of law laid down by the lower court in this case.

This Court decided this point, we believe, in favor of the petitioner herein when Justice Harlan said:

> "Whether an individual is insane is not always best solved by abstruse metaphysical speculations expressed in the technical language of medical science. The common sense and we may add, the natural instincts of mankind, reject the supposition that only experts can approximate certainty upon such a subject."
>
> *Connecticut Mutual Life Insurance Co.* v. *Lathrop*, 111 U. S. 612, 28 L. Ed. 536.

We believe that the statements of the court below in this case will appear all the more erroneous when one considers the history of the medical profession. At one time the bar-

bers were the surgeons; then there developed various schools of thought, and shortly after the Civil War, it was decided by one branch of those practicing the healing art that it was not necessary to administer medicine or use a knife. In recent years there has developed a school that believes that the manipulation of the vertebræ is a cure all. Vast strides have been made during the past ten years in the diagnosis and treatment of various conditions. Prognoses, diagnoses, and the names of diseases are rapidly changing. Not many years ago the popular thing for doctors to do for a great many diseases was to drain the patient of blood by cupping. It is not uncommon for experts to diagnose and many physicians have each given a different diagnosis for the same patient and prescribed different systems of treatment. And so long as even the most elementary principles of diagnosis and treatment seem to be based upon such shifting sands, we believe that a jury that gets a complete history of the individual person, his educational qualifications before disability, the nature of his disability, his efforts to work and failures thereat, his pain and suffering, his consultation with and treatment by physicians, his record of hospitalization, the economic urge for him to carry on, and all of the various factors that enter into the individual's relation with society, *and particularly the persistence of a total disability over a long period of time*, is in position to pass upon the permanency of a disability without the absolute necessity of having some medical man state that in his opinion it was or was not permanent at a certain time. The upholding of the action taken by the lower court in the instant case would be to invade the province of the jury as to the ultimate fact before it for decision.

We urge that the fact to be proved, *factum probandum*, that is, permanency, is susceptible of proof by many other

facts in many of these cases by evidence other than the opinion of experts. It will be borne in mind that this was not a case of malpractice, where the standards of professional treatment in a certain community are involved. The doing of an improper thing, or the failure to do the proper thing, and many other professional matters are involved in a malpractice case, but not in a case of this type. As wigmore says:

> "There is not and ought not to be any general rule for actions, requiring expert testimony so far as the topic permits of testimony from persons not so qualified."
>
> *Wigmore* (2d) Ed.), Vol. 11, Par. 2090, page 456.

We believe that a war risk insurance case, where the jury has the benefit of all the subsequent history of the individual, is a case susceptible of proof in another manner than by the opinion of experts. The long continuity of conditions related by the various witnesses in this case prior to his discharge and subsequent thereto is cogent evidence, we believe, of permanency.

It was aptly stated by a federal district judge, in a war risk insurance case (*McClovern* v. *U. S.*, 294 Fed. 108).

> "As permanency of any condition (here, total disability) involves the element of time, the event of its continuance during the passage of time is competent and cogent evidence."

In the case of *Barksdale* v. *U. S.*, (C. C. A. 10) 46 Fed. (2d) 762 at 764, the court said:

> "However this may be, the jury might well have been inclined to take the positive evidence of the plaintiff to the opinion of the medical men which he called in his behalf. Medical men indulge, very generally, in theorizing on the affairs of life, while the living of life is a very practical affair. What it is possible for one

man to do is utterly impossible for another to perform, though apparently both are in the same mental and physical condition. The government inducted boys into the military branch of our country to meet the exigencies of affairs under which Europe suffered without perhaps much thought of their mental power or physical equipment so long as they did not seem to be disqualified. Being in the service, they were granted contracts of insurance on quite reasonable terms, the government and all others knowing full well when it came to a question whether the policy issued to a certain individual had matured under the terms of the contract the question at issue would be whether the particular individual insured, and bringing the action on a particular policy, taking into account the low order of his mentality or his inexperience in the different affairs of life, could follow continuously some gainful occupation in life; that is to say, to make a living for himself and those dependent upon him, even if the only possible occupation open to him was hard manual labor or menial service. It is true, the evidence shows that, after the date at which the plaintiff claims to have become permanently and totally disabled, he did perform some labor, but this neither shows, nor tends to show, he could perform such labor continuously. The energy and ambition of the person must be called into effect. The energy and ambition of plaintiff may have compelled him to try the labor he undertook, although at the time he was absolutely unable to perform the labor undertaken either temporarily or continuously."

We believe that the recent decision of Senior Circuit Judge Parker of the Fourth Circuit Court of Appeals, in which it was held that a case was properly for the determination of a jury in a war risk insurance case even though there was *no medical evidence* on behalf of the plaintiff of any kind or character, is the proper doctrine. *Hicks* v. *U. S.*, (C. C. A. 4) 65 Fed. (2d) 517.

See also:

U. S. v. *Lesher*, (C. C. A. 9), 59 Fed. (2d) 53;
U. S. v. *Meserve*, (C. C. A. 9), 44 Fed. (2d) 549;
La Marche v. *U. S.*, (C. C. A. 9), 28 Fed. (2d) 828;
Mulivrana v. *U. S.*, (C. C. A. 9), 41 Fed. (2d) 734;
U. S. v. *Riley*, (C. C. A. 9), 48 Fed. (2d) 203;
Fladeland v. *U. S.*, (C. C. A. 9), 53 Fed. (2d) 17;
Bartee v. *U. S.* (C. C. A. 6), 60 Fed. (2d) 247;
U. S. v. *Thomas, et al.* (C. C. A. 10), 64 Fed. (2d) 245;
U. S. v. *Tyrakowski*, (C. C. A. 7), 50 Fed. (2d) 766;
Carter v. *U. S.*, (C. C. A. 4), 49 Fed. (2d) 221;
Madray v. *U. S.*, (C. C. A. 4), 55 Fed. (2d) 552;
Malavski v. *U. S.*, (C. C. A. 7), 43 Fed. (2d) 974;
Kelley v. *U. S.*, (C. C. A. 10), 49 Fed. (2d) 897.

We urge that the decision of the court below invades the spirit of the Seventh Amendment to the Constitution, which guarantees a right of trial by jury and prohibits a reexamination of the same in any court of the United States otherwise than according to the rules of common law, and the history of the adoption of the Seventh Amendment, the insistence upon it by the original thirteen States, and the presence of a similar provision in the Constitution of practically every State in the Union demonstrate that the right to a trial by jury is not to be taken away for technical reasons. *Parsons* v. *Bedford*, 3 Pet. 433, 7 L. Ed. 862.

Conclusion.

It is respectfully urged that the question for determination of whether or not petitioner's total disability was a permanent one at date policy lapsed, should be decided upon *all the evidence relevant thereto* and was not dependent upon expert evidence tending to establish this fact, and

the Circuit Court of Appeals erred in over ruling the jury verdict which was in favor of the petitioner.

Respectfully submitted,

HAROLD C. SYLVESTER,
WARREN E. MILLER,
Attorneys for Petitioner.

(4190)

INDEX

Subject Index

	Page
Supplemental brief of petitioner	1
Statement	1
Brief of argument	4
Argument	4
Point I	4
II	8
III	10
Conclusion	14

Cases Cited

Alice State Bank et al. v. Houston Pasture Co., 247 U. S. 240	9
Bolles v. Outing Co., 175 U. S. 262	7
Capital Trans. Co. v. Cumberla Steel Co., 249 U. S. 334	13
Chicago & E. I. R. Co. v. Collins Produce Co., 249 U. S. 180, 39 S. Ct. Rep. 180, 63 L. Ed. 552	13
Darlington v. Turner, 202 U. S. 195, 26 S. Ct. Rep. 630, 50 L. Ed. 992	13
Euston v. Ascher & Co., Inc., 282 U. S. 445	11
Federal Trade Commission v. Pacific Paper Association, 273 U. S. 52	9
Fitchie v. Brown, 211 U. S. 321	7
Hubbard, Assignee, v. Tod, 171 U. S. 474	8
Langnes v. Green, 282 U. S. 531, 75 L. Ed. 520	6, 13
Mount Pleasant v. Beckwith, 100 U. S. 544	7
Oelwerke Teutonia v. Erlanger & Gallinger, 248 U. S. 521, 39 S. Ct. Rep. 180, 63 L. Ed. 399	13
Oxford Paper Company v. Steamship Nidorholm, 282 U. S. 681, 51 S. Ct. 266, 75 L. Ed. 614	11
John H. Page v. Arkansas Natl. Gas Corp., 286 U. S. 269, 52 S. Ct. 507, 76 L. Ed. 1096	10, 12
Peoria Ry. Co. v. United States, 263 U. S. 528	7
Piedmont & G. C. Coal Co. v. Seaboard Fisheries Co., 254 U. S. 1, 41 S. Ct. Rep. 1, 65 L. Ed. 97	13
Second Russian Insurance Co. v. Miller, 268 U. S. 552, 45 S. Ct. Rep. 593, 69 L. Ed. 1088	13
Steele, Executor, v. Drummond, 275 U. S. 199	10
Story Parchment Co. v. Paterson Co., 282 U. S. 555	6
Terminal R. R. Assn. v. United States, 266 U. S. 17	7
Texas & N. O. R. Co. v. Brotherhood of R. & S. S. Clerks, 281 U. S. 548, 50 S. Ct. 427, 74 L. Ed. 1034	10, 12
The Maria Martin, 12 Wall. 31	7
The Stephen Morgan, 94 U. S. 599	7
U. S. v. American Railway Express Co., 265 U. S. 425	5, 6, 7

Page

U. S. of America v. Commercial Credit Co., 286 U. S. 63, 76 L. Ed. 978 ..... 10, 12
U. S. v. Henry Prentiss & Co., 288 U. S. 73 8
Walsh v. Rogers, 13 How. 283, 14 L. Ed. 147 13
Webster Electric Co. v. Splitdorf Electrical Co., 264 U. S. 463 9

MISCELLANEOUS.

Treasury Decision 20, W. R., and Regulation No. 11 effective March 9, 1918 3

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 152

NEWTON W. LUMBRA, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

SUPPLEMENTAL BRIEF OF PETITIONER.

Statement.

At the time of argument of this case, the respondent presented to this Court, both orally and in its brief, a point which is not included within the questions to be reviewed under the writ, and which for that reason has not been prepared or discussed by the petitioner in his brief. As the briefs in this case were filed only a short time before the argument thereon, petitioner was unable to file a reply brief on the point and for that reason this Court granted leave to petitioner to present his views on the point involved.

Respondent's brief raises the question of law as to whether this Court has jurisdiction to review those parts of the judgment adverse to the respondent, in attempting to

overthrow the judgment of the circuit court of appeals below, although no writ of certiorari was granted except to the petitioner.

There was no cross-petition for certiorari, and this Court has previously consistently refused to review those parts of a circuit court of appeals opinion adverse to respondent in similar cases. The finding of fact of *totality*, which was concurred in by both courts below, will be accepted as conclusive by this Court and will not be reviewed here. For these reasons, we respectfully submit that the respondent is now precluded from questioning in this Court, as it attempts to do, the correctness of the decision of the circuit court of appeals that the insured petitioner was *totally* disabled.

It is clear from respondent's brief and from oral argument that respondent is questioning the decision of the circuit court of appeals in its finding in favor of petitioner upon the question of "total disability." On pages 9 and 10 of respondent's brief it is stated:

> "We respectfully submit that substantial evidence is lacking in this case to establish either of the two conditions which are essential to the recovery of disability benefits under a war-risk insurance contract, namely (1) an impairment of mind or body which renders it impossible for the insured to follow continuously any substantially gainful occupation and (2) a reasonable certainty that the total disability will continue throughout the lifetime of the insured (see Treasury Decision No. 20, *supra*)."

Practically all decided war-risk insurance cases mentioned in respondent's brief relate to the question of *total* disability.

The question before the district court was whether or not Newton W. Lumbra was *totally* and *permanently* disabled within the meaning of his War-Risk Insurance contract

(R. 2-5). Motion was made on behalf of the United States for a directed verdict upon the alleged insufficiency of the evidence to establish *total* and *permanent* disability, which motion was overruled, exception taken (R. 247-248), and a jury verdict in favor of petitioner resulted (R. 11-12). An appeal was taken by the United States to the Circuit Court of Appeals for the Second Circuit, urging as error, among other things, the denial of its motion for a directed verdict (R. 303-305).

The question involved in the circuit court of appeals was whether or not there was sufficient evidence of the insured's *permanent* and *total* disability at or prior to the time his policy lapsed requiring the trial court to submit the case to the jury.

The Circuit Court of Appeals for the Second Circuit found that—

> "while a jury might properly find that while the term insurance contract in question was in force the insured *could not engage continuously in any gainful occupation*"

and was therefore suffering from total disability[1]

> "yet the question of the permanency of the insured's total disability was not established by reason of the fact that no *expert testimony of such permanence was produced and the petitioner failed to establish his claim because of a lack of such expert testimony*". (R. —).

---

[1] Treasury Decision 20, W. R., and Regulation No. 11, effective March 9, 1918, which has never been repealed, defines "total disability" as follows:

"Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, * * * to be total disability."

It will thus be seen that the circuit court of appeals in this case held that there was sufficient evidence of *total disability* to go to the jury and in that respect upheld the decision of the trial court and the verdict of the jury. Therefore the circuit court of appeals ruled adversely to respondent solely upon the question of *permanency*.

Brief of Argument.

I.

This Court does not have jurisdiction in the exercise of its discretion to review those parts of the judgment of the circuit court of appeals adverse to respondent because no writ of certiorari was granted to the respondent or even requested by respondent.

II.

Even should this Court have jurisdiction in the exercise of its discretion to review those parts of the opinion of the circuit court of appeals adverse to respondent, yet to do so would be contrary to the previous rulings of this Court upon the subject.

III.

A finding of fact concurred in by both courts below will be accepted as conclusive by this Court and will not be reviewed here.

ARGUMENT.

I.

This Court does not have jurisdiction in the exercise of its discretion to review those parts of the judgment of the circuit court of appeals adverse to respondent because no writ of certiorari was granted to the respondent or even requested by respondent.

The question which respondent has argued in its brief in respect to the question of *totality* is not presented in the

petition for certiorari. The only specifications of error which were presented to this Court were as follows:

1. The circuit court of appeals erred in holding that the *permanence* of a total disability at date of lapsation of policy for non payment of premium was a fact requiring expert evidence.

2. The circuit court of appeals erred in holding that because no expert evidence was produced of the *permanency* of petitioner's total disability at date of lapsation of policy for non payment of premium, the petitioner failed to establish his claim.

The respondents did not file a petition for certiorari, and for this reason we respectfully urge that this Court is without the jurisdiction to review that part of the judgment below relative to the question of totality.

Practically all of the cases mentioned in respondent's brief pertaining to war risk insurance cases relate to the question of *total* disability.

The argument of respondent relative to the lack of petitioner's *total* disability constitutes an attack upon the decision of the circuit court of appeals holding that *total disability* was established in this case.

The respondent is not seeking to support the judgment on a ground rejected by the court below; it is seeking to have the judgment reversed.

This Court has decided that a respondent or appellee, who has taken no steps to have a judgment against him reviewed, may not *attack* that judgment in this Court. In *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435, this Court said:

> "It is true that a party who does not appeal from a final decree of the trial court can not be heard in opposition thereto, when the case is brought here by

> the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below."

This decision has not been overruled, and the cases upon which the respondent relies do not conflict with it.

In *Langnes v. Green*, 282 U. S. 531, this Court decided that a respondent in certiorari might advance in this Court, in *support of the judgment*, a ground which had been rejected by the court below. In reaching this result it cited and quoted with apparent approval from the opinion in *United States v. American Railway Express Co.*, 265 U. S. 425. See also *Stone Purchment Co. v. Paterson Co.*, 289 U. S. 555, 560. This Court was not called upon in any of these cases cited to decide whether a respondent may attack the judgment below although he has filed no cross petition for certiorari. Any language in the opinion in the *Langnes* case which might seem to relate to this question must be taken in the light of the fact that the *Langnes* case arose in admiralty, and, as this Court recognized in its opinion, an appeal in admiralty is a trial *de novo*.

The present case is an action at law. Under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, the writ of certiorari which this Court has granted on the petition of the petitioner brings the case before this Court "for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal." Under this statute it is plain that this Court's jurisdiction is the same as it would have been if the case had been brought here by the petitioner by writ of error or appeal. This Court has frequently decided that an appel-

lee or a defendant in error may not attack the decree or judgment below, and we submit that these decisions, under the statute quoted above, are controlling here.

In *Ritchie* v. *Brown*, 211 U. S. 321, the point was directly decided by this Court. Counsel for the appellees was permitted to file a brief and to argue against the decree below, "this court stating, however, that it would thereafter decide whether counsel for executors (appellees) had any right to be heard to contend against the decree of the court below" (P. 328). The question was thus squarely presented for decision, and this Court disposed of it as follows (P. 329):

> "We are of opinion that counsel for the executors had no right to appear and be heard against the decree, no appeal having been taken from it by his clients."

A similar result was reached in *Peoria Ry. Co.* v. *United States*, 263 U. S. 528, where this Court said (P. 536):

> "But by failure to enter a cross appeal from the court's action in overruling its objection, the right to insist upon it here was lost. The appellees can be heard before this Court only in support of the decree which was rendered."

Another decision to the same effect is *Terminal R. R. Assn.* v. *United States*, 266 U. S. 17, 28 29. See also *The Maria Martin*, 12 Wall. 31, 40; *The Stephen Morgan*, 94 U. S. 599; *Mount Pleasant* v. *Beckwith*, 100 U. S. 514, 527; *Bolles* v. *Outing Co.*, 175 U. S. 262, 268; *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435, *supra*.

As all of these cases were decided prior to the enactment of the Act of February 13, 1925, the statute, under familiar principles, must be taken to adopt and incorporate the rule which they establish.

This question was urged by the United States, then petitioner in the case of *U. S.* v. *Henry Prentiss & Co.*, 288 U. S. 73, where this Court in a decision rendered January 9, 1933, at page 88 stated:

> "The argument is that this court has jurisdiction in the exercise of its discretion to review those parts of the judgment adverse to the respondent, though no writ of certiorari was granted except to the petitioner, the government, nor was any other even asked for. We are not required at this time either to affirm or to deny the existence of the power that the argument imputes to us. If the power exists, the respondent has not persuaded us that our discretion should be moved to use it."

Petitioner's contention that the point presented by respondent is in effect an attack on part of the judgment of the circuit court of appeals, is emphasized by a review of the cases cited in respondent's brief, the majority of these cases having presented the question of *totality*.

For these reasons we submit that this Court is without jurisdiction to review the judgment below at the behest of the respondent, so far as the respondent seeks to have that judgment reversed.

II.

Even should this Court have jurisdiction in the exercise of its discretion to review those parts of the opinion of the circuit court of appeals adverse to respondent, yet to do so would be contrary to the previous rulings of this Court upon the subject.

In *Hubbard, Assignee*, v. *Tod*, 171 U. S. 474, this Court said:

> "This case belongs to the class of cases in which the decree of the circuit court of appeals is made final by

the statute, and having been brought up by certiorari on the application of petitioner below, is pending before us as if on his appeal."

"And as respondent did not apply for certiorari, we shall confine our consideration of the case to the examination of errors assigned by petitioner."

In *Alice State Bank et al.* v. *Houston Pasture Co.*, 247 U. S. 240, Justice Holmes said:

"* * * But as that is not the ground upon which the writ of certiorari was asked or granted, we confine our discussion to the matter relied upon in asking the intervention of this Court."

In *Webster Electric Co.* v. *Splitdorf Electrical Co.*, 264 U. S. 463, a case concerning three patent claims in the court below, only one of which, however, was questioned in the writ of certiorari, this Court said:

"But the petition upon which writ was granted, challenged the decision below only in respect to third patent; and we are not called upon to consider the contentions now advanced as to the others."

and then cited the case of *Alice State Bank et al.* v. *Houston Pasture Co.*, *supra*, to support its position.

In *Federal Trade Commission* v. *Pacific Paper Association*, 273 U. S. 52, this Court held:

"Respondents, notwithstanding their failure to petition for certiorari, now ask for a reversal of that part of the decree which leaves in force part of paragraph (*e*) and paragraphs (*g*) and (*h*). This Court has the same power and authority as if the case had been carried here by appeal on writ of error. A party who has not sought review by appeal on writ of error, will not be heard in an appellate court as to the correctness of the decree of the lower court. This is so well settled that citation is not neccessary. The respond-

ents are not entitled as of right to have that part of decree reviewed."

In *Steele, Executor*, v. *Drummond*, 275 U. S. 199, at page 203, this Court stated:

> "Respondent sued in District Court for Northern District of Georgia to recover damages for breach of contract. A general demurrer was interposed and sustained. The circuit court of appeals held that one count started a cause of action and reversed the judgment. The petition for certiorari was based on the contention that the contract in suit was contrary to public policy and void. *No other will be considered.*" (Italics ours.)

We submit that even should the Court have jurisdiction to review the decision of the circuit court of appeals in this case as to the question of *totality*, nevertheless, according to the finding of fact of the petitioner's *totality* by the district court and jury and by the circuit court of appeals, this Court will not review such finding:

John H. Page v. *Arkansas Natl. Gas Corp.*, 286 U. S. 269, 52 S. Ct. 507, 76 L. Ed. 1096.

United States of America v. *Commercial Credit Co.*, 286 U. S. 63, 76 L. Ed. 978.

Texas & N. O. R. Co. v. *Brotherhood of R. & S. S. Clerks*, 281 U. S. 548, 50 S. Ct. 427, 74 L. Ed. 1034.

III.

A finding of fact concurred in by both courts below will be accepted as conclusive by this Court and will not be reviewed here.

This Court has recently held in two different cases where a review by the Supreme Court of the United States of a judgment of a circuit court of appeals is sought because of

a conflict of opinions on one of the questions therein involved between such circuit court of appeals and the circuit court of appeals of another circuit, this Court will consider such question *only*.

In the instant case the petition for certiorari asked for the writ because of the conflict of opinion in several circuits as to the test of the *permanency* of a total disability. That is the only question raised by petitioner's application for a writ and assignment of error. It was the only matter which this Court could possibly consider at the time petitioner's application for certiorari was granted. Therefore the error complained of by *petitioner* is the only error now properly before this Court for consideration.

As stated in *Enstein* v. *Ascher & Co., Inc.*, 282 U. S. 445:

> "The petition here for certiorari asked for the writ because of the conflict of opinion in the two circuits. The contested below and differently ruled in the Circuit Court of Appeals, concerns the effect of the delay in disclaiming. According to the usual practice we will consider nothing else" (Justice McReynolds).

This Court in other recent decisions has stated where no application for certiorari is made by the respondent, its consideration is limited to errors assigned by the petitioner.

Even though in an admiralty suit, an appeal is in the nature of a trial *de novo*, this Court held in that type of case, in *Oxford Paper Company* v. *Steamship Nidarholm*, 282 U. S. 681; 51 S. Ct. 266; 75 L. Ed. 614, which was a case where the respondent sought to raise the question of liability different from that sought by the petitioner in his application for writ. This Court refused to consider that respondent's claim, and held:

> "As respondent did not ask certiorari, the only question we shall consider is whether or not the Court was

wrong in denying the asserted liability of the ship for the entire loss."

In the instant case regarding *totality* the trial court, in denying defendant's motion for directed verdict, found sufficient evidence to submit that question to the jury. In the circuit court of appeals, the respondent urged as error the action of the trial court in submitting that question as well as the question of "permanency" to the jury. However, the circuit court of appeals, in a specific finding, affirmed the action of the lower court so far as "total disability" was concerned, stating that there was sufficient evidence of *total* disability in the following language:

> "There was evidence from which a jury might find that, when the plaintiff ceased to pay premiums in May, 1919, he was *totally* disabled, but none from which they might find that his disability was '*permanent*'." (Italics ours.)

Therefore, there has been a finding of fact by two lower courts, supported by the jury's finding, of *total* disability in the instant case.

In recent cases in which this Court has passed on this question, the following language was used:

> "Many and complicated questions of fact are involved and were argued here, but as they have been found in favor of the respondent by both courts below we do not review them."
>
> *John H. Page* v. *Arkansas Natl. Gas. Corp.*, 286 U. S. 269, 52 S. Ct. 507, 76 L. Ed. 1096.
>
> *United States of America* v. *Commercial Credit Co.*, 286 U. S. 63, 76 L. Ed. 978.
>
> *Texas & N. O. R. Co.* v. *Brotherhood of R. & S. S. Clerks*, 281 U. S. 548, 50 S. Ct. 427, 74 L. Ed. 1034.

The rule sometimes appears to be different in admiralty cases and is set forth in *Langnes* v. *Green*, 286 U. S. 531, 75 L. Ed. 520.

Though it is recognized even in admiralty cases that it is merely a matter of right which the Supreme Court may indulge in but as a matter of practice the Supreme Court will not, as a rule, review facts found and concurred in by both lower courts. The admiralty rule seems to be based upon the fact that an appeal by either party brings the cause *de novo* before the circuit court of appeals and any finding of fact made by that court may be reviewed by the Supreme Court if it sees fit so to do. Where the case is one at law, however, it seems to be clearly established as heretofore indicated. There are even many cases in admiralty, however, in which the Supreme Court has refused to review the fact where concurred in by both lower courts and has stated that no such review will be made unless the finding in the lower courts was clearly in error.

Piedmont & G. C. Coal Co. v. *Seaboard Fisheries Co.*, 254 U. S. 1, 41 S. Ct. Rep. 1, 65 L. Ed. 97.

Walsh v. *Rogers*, 13 How. 283, 14 L. Ed. 147.

Oelwerke Teutonia v. *Erlanger & Galinger*, 248 U. S. 521, 39 S. Ct. Rep. 180, 63 L. Ed. 399.

A verdict approved by two lower courts will be accepted by this Court as a conclusive finding upon the question of fact involved.

Chicago & E. I. R. Co. v. *Collins Produce Co.*, 249 U. S. 186, at page 192, 39 S. Ct. Rep. 189, 63 L. Ed. 552.

Second Russian Insurance Co. v. *Miller*, 268 U. S. 552, 45 S. Ct. Rep. 593, 69 L. Ed. 1088.

Darlington v. *Turner*, 202 U. S. 195, 26 S. Ct. Rep. 630, 50 L. Ed. 992.

Capital Trans. Co. v. *Cambria Steel Co.*, 249 U. S. 334.

It is, therefore, contended that the law has been clearly established by this Court that where certiorari is allowed, this Court will deal *only* with the error alleged by petitioner, and will not consider error as advanced by the respondent where respondent has not excepted to the finding below and petitioned for a writ of certiorari. It is further firmly established as law by this Court that where the two lower courts have concurred in a finding of fact, this Court will not review those facts; and though a review is sometimes made in admiralty, it is because of the situation peculiar to an admiralty appeal, and is not applicable in a case at law such as the present one. In view of the foregoing, we submit that this Court in the instant case should therefore consider the fact of totality as correctly found and not inquire into that further and should confine its review to the error relating to the requirement of medical evidence in order to establish the *permanency* of the disability, as set forth in petitioner's assignments of error contained in the petition for certiorari.

Conclusion.

For the foregoing reasons it is respectfully submitted that the respondent is now precluded from questioning in this Court the correctness of the decision of the circuit court of appeals that the insured petitioner was *totally* disabled.

Respectfully submitted,

HAROLD C. SYLVESTER,
WARREN E. MILLER,
Attorneys for Petitioner.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulation involved	2
Statement	3
Argument	5
Conclusion	7

CITATIONS

Cases:	
Bartee v. *United States*, 60 F. (2d) 247	6
Martin v. *United States*, 286 U.S. 546	7
Nalbantian v. *United States*, 285 U.S. 536	7
Thompson v. *United States*, No. 902, October Term, 1932	7
Tyrakowski v. *United States*, 50 F. (2d) 766	6
United States v. *Fitzpatrick*, 62 F. (2d) 562	6
Statutes:	
Act of October 6, 1917, c. 105, sec. 400, 40 Stat. 398, 409	2
Act of June 7, 1924, c. 320, sec. 300, 43 Stat. 624, as amended by Act of March 4, 1925, c. 553, sec. 12, 43 Stat. 1308 (U.S.C., Title 38, Sec. 511)	2
Regulation:	
Treasury Decision, 20 War Risk	3

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 152

NEWTON W. LUMBRA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 332–335) is reported in 63 F. (2d) 796.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 14, 1933 (R. 336). The petition for a writ of certiorari was filed June 9, 1933. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the court below, in reversing the judgment of the District Court, erred in holding that there was no substantial evidence to sustain the finding of the jury that petitioner became permanently and totally disabled on May 31, 1919, so as to be entitled to recover under a policy of war-risk insurance.

STATUTE AND REGULATION INVOLVED

Section 400 of the Act of October 6, 1917, c. 105, 40 Stat. 398, 409, provides as follows:

> That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the Bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon the payment of the premiums as hereinafter provided.

This section was restated in Section 300 of the Act of June 7, 1924, c. 320, 43 Stat. 624, amended by Section 12 of the Act of March 4, 1925, c. 553, 43 Stat. 1308 (U.S.C., Title 38, Sec. 511).

Treasury Decision 20 War Risk, of March 9, 1918, defined permanent and total disability as follows:

> Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed * * * to be total disability.
>
> "Total disability" shall be deemed to be "permanent" whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it.

STATEMENT

The petitioner brought suit in the District Court for Vermont to recover the proceeds of a policy of war-risk insurance, alleging that he was permanently and totally disabled on April 29, 1919, while the policy was in force (R. 2–5). The case was tried before the court with a jury (R. 11). At the close of the evidence the defendant moved for a directed verdict, which was overruled, and the jury rendered a verdict for the plaintiff (R. 11), on which a judgment was entered (R. 12). On appeal, the Circuit Court of Appeals for the Second Circuit reversed this judgment on the ground that the evidence was not sufficient to support the verdict (R. 332).

The petitioner enlisted in the Army on July 14, 1917, and was discharged on April 29, 1919. While in the service he was granted a policy of war-risk

insurance in the sum of $10,000 (R. 2–5), which remained in force until May 31, 1919, by payment of premiums. The petitioner testified that he was injurd in France June 17, 1918, during a bombardment by the explosion of a shell which fell near him while he was on his way from the trenches to a dugout. He suffered a physical injury to his ankle and was thrown down and rendered unconscious by the concussion. He was taken to the post hospital, from which he was discharged in August, 1918. While in the hospital he suffered with weak and dizzy spells (R. 20–21). As soon as he recovered from the injury to his ankle he went back to his company and was given light work in the kitchen, but the "spells" continued (R. 22–23).

After the petitioner's discharge from the Army he returned to his mother's home but did nothing for three or four months (R. 25). He then began to work for a company, rolling logs into vats. After a short time at this work he was changed to lighter duties. He retained this employment during the rest of 1919 and 1920 (R. 26). He was forced to give up this position in 1921 (R. 26, 28), but thereafter he obtained employment as a machinist's helper and laborer with the Central Vermont Railroad (R. 29). He kept this job about a year but lost considerable time (R. 30). From June, 1923, to November, 1923, he worked for the Boston & Maine Railroad, losing considerable time because of his condition (R. 30). He then re-

turned to the Central Vermont Railroad and remained with it until February, 1929, as a laborer and janitor (R. 31).

Dr. Frank B. Hunt, a witness for the petitioner, testified that he treated the petitioner for nervousness, rheumatism, and chronic bronchitis in June, 1920, and that the petitioner made no complaint at that time of having epileptic seizures of any kind. The doctor testified that the petitioner was not totally incapacitated at the time of his examination. (R. 124–126.) Dr. Byron Herman also testified for the petitioner. He stated that he began treating the petitioner for epilepsy about 1926 or 1927 (R. 168). On cross-examination, the doctor was shown the report of a physical examination he made in 1920 and he testified that he had diagnosed the petitioner's illness at that time as rheumatism and laryngitis, and that his degree of vocational handicap was negligible (R. 172–173). The witness also testified that the petitioner was now able to do any sort of work which would not bring him into close contact with machinery (R. 170, 172).

ARGUMENT

The court below held that the evidence was not sufficient to show that the petitioner was totally and permanently disabled on May 31, 1919. The court concluded that (R. 333–334)—

> there was no testimony that when he allowed his policy to lapse his condition was such that it could be said with reasonable certainty

> that he then had epilepsy or that epilepsy would ensue or that for any reason he was then permanently disabled. There was evidence from which a jury might find that, when the plaintiff ceased to pay premiums in May, 1919, he was totally disabled but none from which they might find that his disability was permanent.

We submit that this decision was correct.

The court below correctly held, we submit, that "It is not shown that his condition was incurable in May, 1919, merely because it became so years later" (R. 335). As the court pointed out, other causes may have contributed to the ultimate result. Since there was no evidence that the petitioner was permanently disabled in May, 1919, the verdict of the jury was without support. This conclusion is fortified by the fact that the petitioner was employed during practically all of the ten-year period following the lapse of his policy. Partial disability during that period is not sufficient to show that he was totally and permanently disabled on May 31, 1919.

The petitioner relies on an alleged conflict between the decision in the present case and the decisions in *Tyrakowski* v. *United States,* 50 F. (2d) 766 (C.C.A. 7th), *Bartee* v. *United States,* 60 F. (2d) 247 (C.C.A. 6th), and *United States* v. *Fitzpatrick,* 62 F. (2d) 562 (C.C.A. 10th). These decisions are simply applications of the same general principle as to the sufficiency of the evidence

required to support a verdict as that adopted by the lower court in the instant case. These decisions, as well as the one under consideration, agree that in determining the sufficiency of the evidence, it must be considered and construed in the light most favorable to the plaintiff.

In its essential features this case is not distinguishable from other war-risk insurance cases in which this Court has declined to grant certiorari. *Martin* v. *United States*, 286 U.S. 546; *Nalbantian* v. *United States*, 285 U.S. 536; *Thompson* v. *United States*, No. 902, October Term, 1932, certiorari denied May 29, 1933.

CONCLUSION

We submit that the decision below is correct. The question involved is one of fact and is not of general importance. The petition should be denied.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.
ROY ST. LEWIS,
Assistant Attorney General.
ERWIN N. GRISWOLD,
W. CLIFTON STONE,
Attorneys.

JULY, 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	3
Argument	8
Conclusion	30

CITATIONS

Cases:

Birdsell v. *United States*, 4 F.Supp. 140	21
Carter v. *United States*, 49 F. (2d) 221	16
Chicago, B. & Q. R.R. Co. v. *Warner*, 108 Ill. 538	23
Cork v. *Lehigh Valley R. Co.*, 98 N.J. L. 143	30
Eggen v. *United States*, 58 F. (2d) 616	9, 29
Evans v. *Sucss Ornamental Glass Co.*, 83 Fed. 706, certiorari denied, 171 U.S. 687	30
Ewing v. *Goode*, 78 Fed. 442	22
Gunning v. *Cooley*, 281 U.S. 90	21
Hardy-Burlingham Mining Co. v. *Baker*, 10 F. (2d) 277	27-29
Hirt v. *United States*, 56 F. (2d) 80	16
Joslyn v. *Cadillac Automobile Co.*, 177 Fed. 863	30
Lake Shore & M. S. Ry. Co. v. *Johnsen*, 135 Ill. 641	23
Latting v. *Owasso Mfg. Co.*, 148 Fed. 369	30
Long v. *United States*, 59 F. (2d) 602	16
Mason v. *United States*, 63 F. (2d) 791	16
McCrosson v. *Philadelphia Rapid Transit Co.*, 283 Pa. 492	29
Nalbantian v. *United States*, 54 F. (2d) 63, certiorari denied, 285 U.S. 536	16
Nicolay v. *United States*, 51 F. (2d) 170	14
Noble v. *Canon City*, 73 Colo. 374	30
Ross v. *Kansas City*, 48 Mo. App. 440	23
Proctor v. *Dillon*, 235 Mass. 538	30
Shawnee-Tecumseh Traction Co. v. *Griggs*, 50 Okla. 566	23, 24
Strohm v. *Railroad Co.*, 96 N.Y. 305	23
United States v. *Alvord*, 66 F. (2d) 455	15
United States v. *Blackburn*, 33 F. (2d) 564	29
United States v. *Clapp*, 63 F. (2d) 793	21
United States v. *Cochran*, 63 F. (2d) 61	16
United States v. *Cole*, 45 F. (2d) 339	8, 27
United States v. *Diehl*, 62 F. (2d) 343	9, 16

Cases—Continued. Page

United States v. *Fly*, 58 F. (2d) 217 ..... 13, 16
United States v. *Hainer*, 61 F. (2d) 581 13
United States v. *Harrison*, 49 F. (2d) 227 16
United States v. *Kerr*, 61 F. (2d) 800 ..... 10, 13
United States v. *Linkhart*, 64 F. (2d) 747 ..... 16, 17
United States v. *McCreary*, 61 F. (2d) 804 16
United States v. *McGrory*, 63 F. (2d) 697, certiorari denied, 289, U. S. 742 15
United States v. *McLaughlin*, 53 F. (2d) 450 ..... 9, 13, 20
United States v. *McPhee*, 31 F. (2d) 243 ..... 13, 20
United States v. *Martin*, 54 F. (2d) 554, certiorari denied, 286 U.S. 546 ..... 13, 15
United States v. *Peet*, 59 F. (2d) 728 16
United States v. *Perkins*, 64 F. (2d) 243 15
United States v. *Perry*, 55 F. (2d) 819 17
United States v. *Phillips*, 44 F. (2d) 689 16
United States v. *Pullig*, 63 F. (2d) 379 12
United States v. *Rice*, 47 F. (2d) 749 14
United States v. *Thomas*, 53 F. (2d) 192 13
United States v. *Thomas*, 64 F. (2d) 245 16
United States v. *Wilson*, 50 F. (2d) 1063 13
White v. *United States*, 53 F. (2d) 565 ..... 8, 29
White v. *United States*, 270 U.S. 175 12
Wise v. *United States*, 63 F. (2d) 307 10

Statutes:

Act of October 6, 1917, c. 105, sec. 400, 40 Stat. 398, 409 2
Act of June 7, 1924, c. 320, sec. 300, 43 Stat. 624, as amended by Act of March 4, 1925, c. 553, sec. 12, 43 Stat. 1308 (U.S.C., Title 38, Sec. 511) 2

Regulation:

Treasury Decision 20 War Risk 3

Miscellaneous:

Fraser's "Trauma, Disease, Compensation," 1930 ed., p. 56 20

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 152

NEWTON W. LUMBRA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 332–335) is reported in 63 F. (2d) 796.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 14, 1933 (R. 335–336). The petition for a writ of certiorari was filed June 9, 1933, and was granted October 9, 1933. The jurisdiction of this Court is invoked under Section 240

(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Circuit Court of Appeals erred in reversing the judgment of the District Court on the ground that there was no substantial evidence of total permanent disability of petitioner on May 31, 1919, and as incidental thereto, whether expert medical evidence is necessary to establish total permanent disability arising from an obscure or subjective condition.

STATUTES AND REGULATIONS INVOLVED

Section 400 of the Act of October 6, 1917, c. 105, 40 Stat. 398, 409, provides as follows:

> That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the Bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon the payment of the premiums as hereinafter provided.

This section was restated in substance in Section 300 of the Act of June 7, 1924, c. 320, 43 Stat. 624,

as amended by Section 12 of the Act of March 4, 1925, c. 553, 43 Stat. 1308 (U.S.C., Title 38, Sec. 511).

Treasury Decision 20, Bureau of War Risk Insurance, of March 9, 1918, defined total permanent disability as follows:

> Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemd * * * to be total disability.
>
> "Total disability" shall be deemed to be "permanent" whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it.

STATEMENT

The petition in the District Court, dated November 30, 1931, alleged maturity of a contract of war risk term insurance by total permanent disability on April 29, 1919 (R. 2–5). The case was tried before a jury (R. 15). At the close of all the evidence the United States moved for a directed verdict and to the denial thereof noted an exception (R. 247–248). The jury returned a verdict for the petitioner, upon which judgment was entered awarding payments of $57.50 a month from May 31, 1919 (R. 11–12).

The United States appealed to the Circuit Court of Appeals for the Second Circuit, urging as error, among other things, the denial of its motion for a directed verdict (R. 303–305). The Circuit Court

of Appeals reversed the judgment "because there was no evidence that on May 1, 1919, when the policy lapsed for nonpayment of premiums, it was reasonably certain that the disability of the insured would continue throughout his life" (R. 332).

The petitioner testified that he sustained an injury to his ankle and was rendered unconscious by concussion from a shell explosion while in service in France on June 17, 1918 (R. 20); that he remained in the hospital until late July or August 1918 (R. 84); that during his hospitalization he suffered frequently from "faint, weak spells, dizzy spells—everything go black, and the sweat stand out on me and I would have to sit down" (R. 21) but did not bring this condition to the doctors' attention as he wanted to rejoin his company (R. 22). Returned to duty, he testified that he was assigned to light kitchen work and so remained until he was discharged, April 29, 1919 (R. 23); that he did not seek or receive medical treatment in service after August 1918, but the "spells" of weakness and dizziness recurred and got gradually worse (R. 23).

For three or four months after discharge petitioner "stayed to home and rested" (R. 25). He then worked at a mill in 1919, 1920, and a portion of 1921, first at his pre-war duties rolling heavy logs into a vat nine or ten hours daily, and then at lighter inside work (R. 26), for wages of "around three dollars a day" (R. 93). He did not work "half of the time" and estimated his earnings at $10.00 or $11.00 weekly (R. 27).

Thereafter, he helped on his sister's farm for a few months, and then obtained employment with the Central Vermont Railroad Company in July 1922 (R. 29-30). He worked as a machinist's helper for "not quite a year" and then as a laborer in the car department. He testified to having lost considerable time (R. 30).

Following employment by the Boston and Maine Railroad, during which period he testified he lost considerable time and was discharged therefor (R. 30-31), the petitioner was again employed by the Central Vermont Railroad Company as a laborer or helper during the years 1924 to 1926 (R. 31). In 1926 he was assigned by the same company to lighter work as a janitor (R. 31) and was so employed until 1929 (R. 33), except for a brief period as night watchman (R. 32). On each of these assignments he testified that he lost considerable time from work (R. 31-32). Several witnesses testified that because the petitioner was a veteran he had been accorded favored treatment with respect to the deficiencies of his work (R. 122, 128–129, 139).

In February 1929, according to his testimony, petitioner had an attack or "spell" of unconsciousness while at work and was dismissed from employment (R. 33, 38). Subsequently he failed to secure employment and has done no work since (R. 38). While petitioner testified that his first seizure at work occurred in February 1929, he

stated that attacks of unconsciousness began in late 1922, or early 1923 (R. 33, 93), and that preceding such attacks he frequently would experience the same symptoms of nervousness which he testified manifested themselves while he was in the hospital in France (R. 39).

In 1919 and 1920 petitioner was treated by Dr. Frank B. Hunt for "nervous trouble; bronchitis" (R. 28). Dr. Hunt fixed the beginning date of his treatments as June 1920, at which time he found "rheumatism, chronic bronchitis and nervousness", considered by him in December 1920, to have "incapacitated Mr. Lambra to a certain extent from doing his daily tasks." The physician ascribed the foregoing disabilities to "shell shock, poison gas, and inclement weather during his war service" (R. 124) but did not consider his disability as totally incapacitating (R. 126). Petitioner did not complain to him of having epileptic seizures of any kind (R. 125).

Petitioner's first medical attention for the attacks to which he testified he had been subject to in a gradually increasing degree since June 1918, was in 1926 (R. 36). In 1926 or 1927, Dr. Byron Herman treated him for epileptiform seizures (R. 168), considered by the doctor as a possible result of concussion (R. 169.) This witness testified that one thus afflicted could work without danger at any ordinary labor not in close contact with machinery (R. 170). In 1920, upon his examination, on be-

half of the Veterans' Bureau, of the petitioner in connection with a claim for compensation, he had found a "negligible" vocational handicap, and in his report, under the heading "Brief military history of claimant's disability" made the record "never sick in army; Hospital once for sprained ankle in France" (R. 172).

Dr. Alan Davidson attended petitioner after the attack at work in 1929 (R. 158), and made a diagnosis of epilepsy, for which he knew no cure (R. 159). He recommended petitioner's dismissal from employment (R. 160). He expressed the opinion that an epileptic seizure would be a possible cause of injury by falling (R. 165) although between seizures one so afflicted "is perfectly capable" (R. 166).

Dr. Albee A. Skeels, who became acquainted with petitioner but a few months before the trial (R. 174), testified that traumatic epilepsy might develop five years after the initial injury (R. 182) and from the history considered petitioner to have grand mal epilepsy caused by head injury (R. 184). He did not know what petitioner's condition had been before his first seizure in 1923 but testified that he had "some nervous seizure" (R. 186).

Medical testimony for the United States showed petitioner to have a mild neurasthenia on examinations in 1924 (R. 203), later diagnosed as "severe neurasthenia and severe hysteria" in 1928, with a history of attacks of unconsciousness developing between 1926 and 1927 (R. 204, 211).

Government records introduced by the United States established that the Army medical history of the petitioner showed only hospital treatment for a sprained ankle sustained as a result of slipping while entering a dugout after a bombardment (R. 278, 274–280); a finding of no disability by an examining surgeon at discharge (R. 273), concurred in by the petitioner's company commander (R. 272), and a declaration at that time by the petitioner that he was not disabled in any way (R. 270–271). Other records relating to claims filed with the Veterans Bureau by the petitioner showed that in January 1927 he claimed compensation for "bronchial troubles, rheumatism, nervousness" resulting from "foreign service, gas and exposure" stated to have been first manifested "about one year ago" (R. 292). A similar claim, executed March 21, 1922, records "partial" disability of "lungs and throat" resulting from "gas" (R. 296).

The United States also introduced various applications by the petitioner for employment with the Central Vermont Railroad in which he stated that he had no physical defect which would render him unfit for service on the railroad (R. 282–290).

ARGUMENT

It is well established that recovery of disability benefits in a suit on a contract of war-risk insurance necessitates a submission of substantial evidence of total disability during the life of the insurance contract (*White* v. *United States*, 53 F. (2d) 565 (C.C.A. 5th); *United States* v. *Cole*, 45 F.

(2d) 339 (C.C.A. 6th); *United States* v. *McLaughlin*, 53 F. (2d) 450 (C.C.A. 8th)) then reasonably certain to continue totally disabling for life (*Eggen* v. *United States*, 58 F. (2d) 616 (C.C.A. 8th); *United States* v. *Diehl*, 62 F. (2d) 343 (C.C.A. 4th)).

In reversing the judgment for the petitioner (R. 335) the Circuit Court of Appeals for the Second Circuit held that the evidence submitted in the trial court was insufficient to establish the requisite condition of the disability alleged and therefore did not support the asserted claim to disability benefits as a result of claimed total and permanent disability. In the course of its opinion the court below said concerning the petitioner's contention that his contract of war-risk insurance had matured before lapse (R. 333–334):

> there was no testimony that when he allowed his policy to lapse his condition was such that it could be said with reasonable certainty that he then had epilepsy or that epilepsy would ensue or that for any reason he was then permanently disabled. There was evidence from which a jury might find that, when the plaintiff ceased to pay premiums in May, 1919, he was totally disabled, but none from which they might find that his disability was permanent.

We respectfully submit that substantial evidence is lacking in this case to establish either of the two conditions which are essential to the recovery of disability benefits under a war-risk-insurance

contract, namely (1) an impairment of mind or body which renders it impossible for the insured to follow continuously any substantially gainful occupation and (2) a reasonable certainty that the total disability will continue throughout the lifetime of the insured (See Treasury Decision No. 20, *supra*).

The insurance protection in this case expired on May 31, 1919 (R. 248). The petitioner contended that he was permanently and totally disabled on or before April 29, 1919, which appears to have been the date of his discharge from the service (R. 3). Claim for disability benefits under the insurance protection was not made until some years later and the suit in the instant case was filed November 30, 1931 (R. 1).

It has been held by several Circuit Courts of Appeals that such deferred assertion of rights alleged to have accrued many years previously requires a high degree of supporting evidence. *Wise* v. *United States*, 63 F. (2d) 307 (C.C.A. 5th); *United States* v. *Kerr*, 61 F. (2d) 800 (C.C.A. 9th). It may be presumed that recognition was given by these decisions to the fact that the long postponement of a claim to relief benefits for such a condition as permanent and total disability is, in the absence of explanation, not consonant with normal human conduct.

Analysis of the evidence in this case discloses many facts inconsistent with the present claim of a disability alleged to have been permanently and

totally disabling in May 1919. Petitioner's testimony indicates that he communicated neither to the medical authorities in the Army nor to his immediate superiors any indication of the nervous disability which he now asserts existed during service (R. 22.) He performed the duties assigned to him in service without any disability becoming apparent to his officers or comrades (R. 87); was mustered out of service after physical examination with such alleged disability unclaimed and undetected, specifically denying disability at discharge (R. 270–273). He executed two separate sworn claims for compensation as a disabled veteran, dated more than two years after the alleged maturity of his insurance contract, assigning in each claim disabling conditions not now urged, and in one application, executed March 21, 1922, described the disability claimed as relating to "lungs and throat," indicated its inception as a year previous to the filing of the claim and estimated the disability to be of partial degree (R. 291–301; 296). Following his discharge from service petitioner worked for one company for approximately two years, and after he had married was employed by another company from 1922 until 1929, except for a brief period of employment at other work (R. 26–33).

Reviewing the evidence in the light most favorable to the petitioner we submit that at the most it tends to indicate only that the petitioner on or before May 31, 1919, was suffering from a possibly progressive nervous disorder which at that time

and for a number of years later handicapped him in employment by reason of loss of time and inability to perform work requiring strenuous physical effort or close application and which had the probable effect of reducing somewhat the remuneration received.

Even if such were the facts they would be insufficient to mature the insurance against total permanent disability. The insurance issued, which this Court has recognized in the case of *White* v. *United States*, 270 U.S. 175, was at a considerable cost to the Government over the premiums received, did not contemplate indemnity against impaired health or earning capacity, but provided insurance only against the two contingencies, death and permanent total disability, as authorized by Congress in the Act of October 6, 1917, *supra*. See *United States* v. *Pullig*, 63 F. (2d) 379 (C.C.A. 8th).

The condition of total permanent disability has long had an accepted meaning in the field of insurance, and the definitive regulation incorporated in Treasury Decision 20, *supra*, finds support in such general insurance acceptation. It has been many times recognized by various Circuit Courts of Appeals that impaired earning capacity or experienced difficulty, inconvenience, or discomfort in employment is not enough to establish an inability to follow "*any* substantially gainful occupation." (Italics ours.)

In the case of *United States* v. *Martin*, 54 F. (2d) 554 (C.C.A. 5th), certiorari denied, 286 U.S. 546, which involved a suit on a war risk insurance contract, the Circuit Court of Appeals, in reversing the judgment of the District Court stated in reviewing the evidence in the case (p. 556):

> From these facts, which are furnished by himself and his witnesses, it appears that the sum and substance of his case is that he received a wound while acting as messenger on the battle front. It has caused him suffering and disability and has to some extent handicapped him in business; it has not at all prevented him from following occupations by which he has carried his livelihood. That the government should liberally recognize wounds so received no one can doubt, and that plaintiff should receive compensation goes without saying. These matters, however, are for consideration by Congress and the agencies employed by it to administer its bounty. * * *

See also *United States* v. *Hainer*, 61 F. (2d) 581 (C.C.A. 9th); *United States* v. *Kerr*, *supra*; *United States* v. *Fly*, 58 F. (2d) 217 (C.C.A. 8th); *United States* v. *McLaughlin*, *supra*; *United States* v. *Thomas*, 53 F. (2d) 192 (C.C.A. 4th); *United States* v. *Wilson*, 50 F. (2d) 1063 (C.C.A. 4th); and *United States* v. *McPhee*, 31 F. (2d) 243 (C.C.A. 9th).

In the instant case it affirmatively appears from the petitioner's own testimony that he worked for

a period of some ten years after discharge from the Army and there is no evidence, direct or inferential, that his returns therefrom were not substantially gainful. To the contrary, testimony was given by the paymaster of the Central Vermont Railroad, for which company petitioner worked in 1922, indicating wages of substantial amount considering petitioner's qualifications and station in life as an unskilled laborer (R. 234).

Numerous decisions of Circuit Courts of Appeals have established the legal insufficiency of proof of permanent and total disability where evidence was adduced of gainful employment over extended periods. The Circuit Court of Appeals for the Tenth Circuit in the case of *Nicolay* v. *United States*, 51 F. (2d) 170, in discussing the question of employment pursued over an extended period, as in this case, said (p. 173):

> * * * the subsequent employment may be of such duration, and be of such a nature, that it conclusively refutes any idea that the insured might have been permanently and totally disabled prior to and during the employment.

In the case of *United States* v. *Rice*, 47 F. (2d) 749 (C.C.A. 9th), the court stated in the course of the opinion that (p. 750):

> * * * a finding by the jury that the appellee was unable to do that which he had been doing almost daily for a period of more than five years is without support in the tes-

> timony. In so deciding we are not invading the province of the jury; we are simply declaring the law.

In the case of *United States* v. *Perkins*, 64 F. (2d) 243, the Circuit Court of Appeals for the Tenth Circuit had under consideration a record of employment of the insured with a railway company for nine years, which bears substantial similarity to the employment record of the petitioner in this case. The court said (p. 244):

> * * * No man who is totally and permanently disabled can hold a responsible position with a railway company for nine years, averaging better than full time each month, with but one interruption of consequence. The fact of this steady, continuous, profitable employment is an unanswerable refutation to any claim that he was totally disabled during the years of that employment. A finding that a man cannot do what he in fact did, cannot stand. To so hold is to strike out the language of the contract, and to render a judgment contrary to the physical facts. This court, and other courts, have consistently held that there can be no recovery where the employment was of much shorter duration, and of much less continuity, than the employment here involved. * * *

Compare also *United States* v. *Martin, supra; United States* v. *Alvord*, 66 F. (2d) 455 (C.C.A. 1st); *United States* v. *McGrory*, 63 F. (2d) 697 (C.C.A. 1st), certiorari denied, 289 U.S. 742;

Mason v. *United States*, 63 F. (2d) 791 (C.C.A. 2d); *United States* v. *Diehl*, *supra*; *Long* v. *United States*, 59 F. (2d) 602 (C.C.A. 4th); *United States* v. *Harrison*, 49 F. (2d) 227 (C.C.A. 4th); *Nalbantian* v. *United States*, 54 F. (2d) 63 (C.C.A. 7th), certiorari denied, 285 U.S. 536; *United States* v. *Linkhart*, 64 F. (2d) 747 (C.C.A. 7th); *United States* v. *Fly*, *supra*; *United States* v. *McCreary*, 61 F. (2d) 804 (C.C.A. 9th); *United States* v. *Cochran*, 63 F. (2d) 61 (C.C.A. 10th); *Hirt* v. *United States*, 56 F. (2d) 80 (C.C.A. 10th); *United States* v. *Peet*, 59 F. (2d) 728 (C.C.A. 10th).

There have been decisions rendered in which it was held that recovery on the theory of permanent and total disability could be sustained even though the insured had worked at periods subsequent to the asserted inception date of the disability. Compare *United States* v. *Thomas*, 64 F. (2d) 245 (C.C.A. 10th); *Carter* v. *United States*, 49 F. (2d) 221 (C.C.A. 4th); *United States* v. *Phillips*, 44 F. (2d) 689 (C.C.A. 8th). But when, as in this case, an insured is shown to have obtained and held employment with two companies for an aggregate period of nearly ten years and with no evidence that he worked at substantial injury to health, a claim of total permanent disability prior thereto appears untenable. Conceding *arguendo* that petitioner was frequently absent from work during the nearly ten years in which he was employed subsequent to the date of alleged total disability, and further conceding that such interruptions of em-

ployment were all due to disability, it is nevertheless submitted that the requirement of the regulation defining total disability is not met by such evidence of interrupted activity. Concerning this point the Circuit Court of Appeals for the Eighth Circuit said in the case of *United States* v. *Perry*, 55 F. (2d) 819, 821, 824:

> * * * The word "continuously" in the definition surely does not mean every day or some definite fixed period as a year or a month, but rather means a substantial portion of time, and, if a party can pursue a gainful occupation for some substantial portion of time as compared with the labor and intensity of work of others in similar lines, he is not totally disabled. There is really no such thing as continuous labor. Holidays, sicknesses, recreation periods, week ends, all are breaks in the continuity of one's occupation, but would not necessarily destroy its continuity.
>
> * * * * *
>
> The evidence here of subsequent employment for a period of twelve years, with an intermission of eighteen months, conclusively, in our judgment, refutes any theory that insured was totally and permanently disabled prior to March 2, 1919.

The Circuit Court of Appeals for the Seventh Circuit also had occasion to pass upon this question in the case of *United States* v. *Linkhart*, *supra*, and therein said (64 F. (2d) 747, 748):

If the word "continuously" be construed to imply without any interruption at all, literal adherence to the regulation might warrant recovery as for a total and permanent disability even though the interruption of occupation or of ability to follow it was but brief and infrequent. Such interpretation of the regulation could not have been intended; or, if intended, it would not be a regulation, but rather legislation by a department without power to legislate; and it would be in contravention of the statute under which this contractual liability attaches only if the disability is *total* and *permanent*.

The regulation so construed would have the practical effect in many cases of eliminating from the contract the word "total" or "permanent," or even both, thereby plunging the insurer into a tremendous potential liability wholly uncontemplated by the contract, or by the statute which is its source.

None of the physicians called by petitioner as witnesses testified to the existence, during the life of the insurance contract, of a total disability then reasonably certain to continue totally disabling.

Of the physicians called as petitioner's witnesses, Dr. Hunt was the first to treat petitioner subsequent to the time at which it was alleged permanent and total disability had arisen. He testified that he treated the petitioner in June 1920 for "rheumatism, chronic bronchitis and nervousness" (R.

124). No complaint was made to the doctor by the petitioner of any epileptic seizures (R. 125), and in an affidavit executed by the doctor under date of December 7, 1920 (R. 124), he described the disability and specifically denoted it as only partially disabling, later testifying under cross-examination that petitioner was not totally incapacitated in 1920 (R. 126).

Dr. Herman presented the first medical evidence of the existence of any epileptic seizures in stating that he first treated petitioner for epilepsy "around 1926 or '7" (R. 168). He had previously seen the petitioner "sometime early after the war" and expressed the opinion that petitioner did not have "much trouble at that time" (R. 167). Dr. Herman's testimony affirmatively establishes that petitioner was not totally disabled from following a substantially gainful occupation even after the epileptic seizures had manifested themselves (R. 170).

The remaining medical witness for the plaintiff was Dr. Skeels, who did not see petitioner until a few months before the trial (R. 174). His testimony is primarily concerned with the possibility of epileptiform convulsions developing from traumatic injury to the head, which convulsions he said, might initially occur five years after the original injury. While he considered that the petitioner was suffering from a grand mal epilepsy at the time of his examination (R. 184), he specifically indicated that he was unable to give any testimony

concerning the petitioner's condition before the seizures manifested themselves, i.e., in 1923 (R. 186).

It may be observed that no evidence was adduced by any of the medical witnesses from which it could be said that it was a reasonable certainty prior to May 1, 1919, that the petitioner was totally disabled for life, especially, when according to the testimony of the petitioner's medical witnesses, his disability at that time was shrouded in uncertainty and was not detected by any attending physican until as late as 1920 (R. 124).

Dr. Skeels' expressed opinion that the subsequently developed form of epilepsy was attributable to service injury might be conceded and yet fail to constitute substantial evidence of a total permenant disability existing in 1919. See *United States* v. *McLaughlin*, *supra*, and *United States* v. *McPhee*, *supra*.

Dr. Skeels was the only witness who indicated the possibility of epilepsy arising from a traumatic injury after a period of five years or more and his opinion in this respect seems to be at variance with recognized authorities on epilepsy. See Fraser's "Trauma, Disease, Compensation," 1930 ed., p. 56.

It is respectfully submitted that the whole sum of the evidence adduced for the petitioner is irreconcilable with a claim of permanent total disability in May 1919, and does not meet the test of substantial evidence as established in the cases

previously cited and by this Court in the case of *Manning* v. *Cooley*, 281 U.S. 90, 94.

The case of *Birdsell* v. *United States*, 4 F.Supp. 140, appears to be almost identical with the instant case. In that case the United States District Court for Colorado directed a verdict for the Government in a claim involving epilepsy where the alleged origin, manifestation of original symptoms, inception of seizures, and work record were substantially the same as in the instant case.

The petitioner also contends that the reference in the opinion of the Circuit Court of Appeals below to the absence of expert testimony as to the temporary or permanent nature of any disability in this case, existent on or before May 31, 1919, constitutes a ruling that only such evidence will be acceptable to establish the requisite condition of permanent disability in this class of litigation. We do not believe the Circuit Court of Appeals decision in this case, or in the case of *United States* v. *Clapp*, 63 F. (2d) 793, which opinion was filed contemporaneously with, and included by reference in, the opinion in this case, can fairly be said to have any such general application. We submit, however, that under particular fact situations the reasoning of the Circuit Court of Appeals in the two cases may be correctly premised. While recognizing that there is no rule of law which requires the jury to surrender their judgment implicitly to

experts and to give a controlling influence to opinions of a scientific witness, it is nevertheless submitted that where a case concerns a highly specialized branch of medical art with respect to which a layman could have no knowledge, the court must be dependent upon expert testimony; and in such cases, in the absence of such evidence, it is improper to submit the case to the jury. This rule was recognized in the case of *Ewing* v. *Goode*, 78 Fed. 442, in which the opinion was written by Circuit Judge Taft. That case involved a suit for malpractice and in reaching the conclusion that there was no evidence before the court legally sufficient to support a verdict in the plaintiff's favor, Judge Taft said (p. 444):

> In many cases, expert evidence, though all tending one way, is not conclusive upon the court and jury, but the latter, as men of affairs, may draw their own inferences from the facts, and accept or reject the statements of experts; but such cases are where the subject of discussion is on the border line between the domain of general and expert knowledge, as, for instance, where the value of land is involved, or where the value of professional services is in dispute. There the mode of reaching conclusions from the facts when stated is not so different from the inferences of common knowledge that expert testimony can be anything more than

> a mere guide. But when a case concerns the highly specialized art of treating an eye for cataract, or for the mysterious and dread disease of glaucoma, with respect to which a layman can have no knowledge at all, the court and jury must be dependent on expert evidence. There can be no other guide, and, where want of skill or attention is not thus shown by expert evidence applied to the facts, there is no evidence of it proper to be submitted to the jury.

In a number of cases involving questions of disability, such as the future possibility of pain and suffering, the test as to whether or not the testimony of expert witnesses can alone afford substantial evidence to support a verdict seems to depend upon whether or not the disability is subjective or objective. If the disability is of the latter character the question has been held not to require the testimony of expert witnesses. See *Shawnee-Tecumseh Traction Co.* v. *Griggs*, 59 Okla. 566; *Chicago, B. & Q. R.R. Co.* v. *Warner*, 108 Ill. 538; *Lake Shore & M. S. Ry. Co.* v. *Johnsen*, 135 Ill. 641.

But where the condition or disability is subjective in character and of such a nature that laymen cannot with reasonable certainty testify as to diagnosis or prognosis, it has been held that evidence by expert witnesses must be offered. See *Strohm* v. *Railroad Co.*, 96 N.Y. 305; *Ross* v. *Kansas City*,

48 Mo. App. 440. In the *Shawnee-Tecumseh Traction Company* case, *supra,* the court said (p. 571):

> In order to lay a predicate for the submission of an instruction to the jury relative to future pain and suffering, where the injuries are subjective, the plaintiff should present proof by expert witnesses as to whether or not the injuries are incurable, and if curable the probable time it will take to effect a cure, and expert witnesses should also testify as to the extent and degree of suffering to be expected in the future, and the evidence should be of that positive nature that the jury can, with reasonable certainty, arrive at some definite conclusion on the subject, and it should not be left to surmise and speculation. In the case at bar, the main expert witness produced by the plaintiff, who knew the complete history of the case from personal knowledge, said that he did not know whether plaintiff's injuries were permanent or not. If this witness, skilled in the medical profession, with every opportunity of knowing all the facts relative to plaintiff's injuries, stated that he did not know whether the injuries were permanent or not, it is certainly most unreasonable to require a jury to take indefinite and uncertain testimony, and therefrom to find that there was a reasonable certainty that plaintiff would or would not suffer future pain which was the clear and logical result of the injury. It is plainly apparent that to require them to do so under the evidence

> offered in this case simply licenses them to enter the field of speculation and to return a verdict upon surmise and conjecture. The evidence was not sufficient to warrant the court submitting to the jury this phase of the case.

We submit that the question of whether total permanent disability exists under the particular facts of this case falls within the logic of the rule cited and that the testimony of skilled witnesses is essential to establish the requisite substantial evidence.

It is believed that it will be generally recognized and conceded that in the field of medicine, there are many physical impairments which up to a certain point manifest in common a multiplicity of symptoms identical in character. In these groups with simulating symptomatology, the true identity must be established to determine whether the disability is remedial and therefore temporary, or whether organic, not amenable to medicinal therapy, and therefore permanent. In many cases the true identity, however, may not be discernible even upon careful and scrutinizing observation by the clinician or surgeon, without recourse to the adjunctive diagnostic aids of the x-ray, laboratory, etc. Evidence, therefore, adduced solely as to the existence of such symptoms in the simulating groups would be of little value as to the true identity, degree, or permanency, and lay witnesses could obviously testify only as to the symptoms.

The evidence in this case indicates that until "the latter part of '22 or first of '23 the insured had suffered no seizures evidentiary of epilepsy (R. 13, 23), but was possibly subject to certain nervous manifestations, including spells of weakness, impairment of vision for brief periods, and difficulty encountered in pursuing strenuous effort. All of these factors or symptoms may be characteristic of so many disabilities, either functional or organic, that only an expert medical diagnostician could shed any light as to the possible nature and extent of the disability. The mere fact that epilepsy subsequently occurred could not, on the common symptoms enumerated, have established it as actually existing as a clinical entity, on such evidence. Hysteria, auto intoxication, alcoholicism, and uremia, to mention but a few conditions, would also give the premonitory symptoms above described. If later, a serious nervous disorder, such as epilepsy, occurs its diagnosis would not be difficult to the trained observer and even the observant lay witness, who might be able to give a graphic account of seizures, could furnish substantial evidence of its existence and possibly of its severity. But there would still remain for determination the relationship, if any, of such epilepsy to the alleged general manifestations above mentioned. No layman could give acceptable testimony on this point, nor could the element of speculation concerning the inception of a serious phase of the disorder be eliminated

except by qualified medical experts. Similarly speculation and conjecture would be necessary even if causation and inception were established, for lay evidence would be valueless as to the prognosis of permanency.

This fact was recognized by the Circuit Court of Appeals for the Sixth Circuit in the case of *United States* v. *Cole*, 45 F. (2d) 339, which involved a suit upon a war risk insurance contract, plaintiff alleging permanent and total disability because of impairment of vision. In holding that there was an absence of any substantial evidence to justify a verdict for the plaintiff the court said (p. 341):

> * * * There should have been some competent opinion evidence from skilled oculists or physicians, definite in its nature, at least tending to show that appellee's affliction had progressed to the extent of total permanent disability within the life of the insurance contract. * * *

In support of the ruling made on this point the court cited the case of *Hardy Burlingham Mining Co.* v. *Baker*, 10 F. (2d) 277.

In the latter case the plaintiff had recovered a judgment based on an alleged personal injury of nervous character which it had been contended was due to the inhalation of poisonous gases during the time the plaintiff worked in the defendant's coal mine. The Circuit Court of Appeals reversed the judgment for absence of substantial evidence, and

said with respect to the question of the testimony of medical experts (p. 280):

> * * * In the ordinary run of affairs, all men have some knowledge as to the natural effects or the probable causes of certain conditions. Such matters do not depend, save as to their extent and refinements, upon expert knowledge and opinion, and all of us may reason intelligently thereon, to a certain point. Upon other subjects this is not true, as, for example, with regard to any chemical reactions beyond those most common and familiar. It is especially not true with diseases of the nerves, or with abnormalities in physiological functions. It is common knowledge that with the latter, and even more with the former, the real cause of the trouble is frequently most obscure. Very often only the most expert diagnosticians can intelligently judge what the cause was, and frequently they can only say what it may have been. It is, we think, common knowledge—if not, this record may supply it—that a great share, perhaps most, of the cases of "nervous wreck" develop without any known specific physical cause. When, therefore, a claim that such a result followed from a known and specific physical or functional upset comes before a court as a basis for demanding compensation therefor, there must, in aid of common knowledge, be some definite and competent expert proof, which shall at least show a fair and reasonable

probability of the cause and effect relation. * * *.

The only medical testimony in this case which bore even remotely upon the question of the identity of epilepsy as a disability from which the plaintiff was suffering at the time of the lapse of his insurance was that of Dr. Skeels and he merely suggested the possibility of the existence of epilepsy in some form, probably of the petit mal type, although his testimony in this regard is confused and obscure (R. 183–187). Such would not be legally sufficient proof. See *McCrosson* v. *Philadelphia Rapid Transit Co.*, 283 Pa. 492 (1925); *White* v. *United States*, 53 F. (2d) 565, 567 (C.C.A. 5th).

Neither Dr. Skeels nor any other medical witness testified that epilepsy, if it then existed, was totally permanently disabling. To permit the jury in this case to decide a question as to the permanence of a disability in 1919 when there was no evidence either of lay or medical witnesses bearing upon it would, as the Circuit Court of Appeals pointed out, allow the indulgence of "mere guess work." In the case of *Eggen* v. *United States, supra,* it was held in a well reasoned opinion rendered by Judge Sanborn, that a finding of total permanent disability might not be based solely upon speculation and conjecture. (Cf. *United States* v. *Blackburn*, 33 F. (2d) 564 (C.C.A. 9th.)) We submit that such is the sole basis for the jury's finding in this case and even if the Circuit Court of Appeals was in error in

assigning the absence of expert evidence relating to the question of permanence of disability as a reason for the reversal of the judgment, nevertheless the decision should be affirmed. It is well settled that the fact that a trial court sustained a motion for a directed verdict on a wrong theory is wholly immaterial if the motion could have been sustained on another ground. *Joslyn* v. *Cadillac Automobile Co.*, 177 Fed. 863 (C.C.A. 6th); *Latting* v. *Owasso Mfg. Co.* 148 Fed. 369 (C.C.A. 8th); *Cork* v. *Lehigh Valley R. Co.*, 98 N.J. L. 143; *Proctor* v *Dillon*, 235 Mass. 538; *Noble* v. *Canon City*, 73 Colo. 374.

It is also well settled that error cannot be predicated on an opinion or reason given by the court for a ruling or decision, but must be inherent in the ruling or decision itself. *Evans* v. *Sucss Ornamental Glass Co.*, 83 Fed. 706, certiorari denied, 171 U.S. 687.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be affirmed.

J. CRAWFORD BIGGS,
Solicitor General.
ANGUS D. McLEAN,
Assistant Solicitor General.
WILL G. BEARDSLEE,
RANDOLPH C. SHAW,
Special Assistants to the Attorney General.
W. CLIFTON STONE,
Attorney.

NOVEMBER 1933.

U.S. GOVERNMENT PRINTING OFFICE: 1933

SUPREME COURT OF THE UNITED STATES.

No. 152.—October Term, 1933.

Newton W. Lumbra, Petitioner, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 8, 1934.]

Mr. Justice Butler delivered the opinion of the Court.

Petitioner was a private in the army of the United States from July 14, 1917, to April 29, 1919. In September, 1917, he obtained war risk insurance against death or total permanent disability. May 31, 1919, the policy lapsed for nonpayment of premiums. November 30, 1931, he brought this suit in the federal district court for Vermont alleging that before May 31, 1919, the policy was matured by his total permanent disability. Issue having been joined, there was trial by jury. At the close of all the evidence respondent requested the court to direct a verdict in its favor. The court denied the motion and, the jury having found for petitioner, entered judgment in his favor. The Circuit Court of Appeals reversed. 62 F. (2d) 796.

Petitioner's claim is that while the policy was in force he became subject to recurring spells of headache, dizziness, epileptic seizures and other illness constituting total permanent disability. The Circuit Court of Appeals held the evidence not sufficient to show total permanent disability of petitioner while the insurance was in force. The question presented is whether there was any evidence upon which a verdict for petitioner might properly be found. And, for its decision, we assume as established all the facts that the evidence supporting petitioner's claims reasonably tends to prove and that there should be drawn in his favor all the inferences fairly deducible from such facts. *Gunning* v. *Cooley*, 281 U. S. 90, 94.

Before joining the army petitioner was a laborer and worked cutting logs, building roads and as a farm and factory hand. When

enrolled he was a healthy and strong man of 25 years. He served overseas in a machine gun company. One of his ankles was injured June 16, 1918, and two days later he was taken for treatment to a base hospital where he remained about a month. It was there recorded that while going into a dugout, he had slipped and severely sprained his ankle, that there was no fracture and that his general condition, heart, lungs and nervous system were satisfactory. When discharged from the hospital he joined his company and remained with it until mustered out at Camp Devens, Massachusetts, April 29, 1919. The official record shows that upon a careful examination at that time by an army surgeon he was found mentally and physically sound; that he declared he had no reason to believe he was impaired in health or was suffering from the effects of any wound, injury or disease, and that his company commander had no reason to believe he then had any wound, injury or disease.

In 1920 petitioner several times consulted Dr. Frank B. Hunt who certified, December 7, 1920, he found petitioner suffering from rheumatism, chronic bronchitis and nervousness. At the trial Dr. Hunt testified that petitioner was not when examined totally incapacitated and did not complain of having had epileptic seizures of any kind. It seems that the certificate was intended for use in support of an application to the United States for compensation.[1] And, apparently in connection with such an application, petitioner was examined by Dr. Byron Herman of the Public Health Service. Under date of December 10, 1920, Dr. Herman reported that while in the army petitioner was never sick although in the hospital once for a sprained ankle, that he became ill after getting home and that he then complained of rheumatism, throat trouble, and husky voice. The doctor's diagnosis was chronic rheumatism and chronic laryngitis, his prognosis was: "Good". He reported that petitioner was able to resume his former occupation; that the degree of vocational handicap was negligible and that vocational training was feasible. January 17, 1921, petitioner verified an application for compensation stating that he was suffering from bronchial troubles,

[1] Compensation for death or disability resulting from personal injuries suffered or disease contracted in the line of duty was provided by Art. III, Act of October 6, 1917, 40 Stat. 405, as amended. The grant of insurance was authorized by Art. IV, Act of October 6, 1917, *supra*, p. 409, as amended. See Runkle *v.* United States, 42 F. (2d) 804, 806.

rheumatism and nervousness which commenced about a year earlier and were caused by gas and exposure in France. And, in March, 1922, claiming to be partially disabled by reason of ailments of the lungs and throat, petitioner made application for compensation and training.

In April, 1924, and in January, 1925 and 1926, petitioner was examined by Dr. Waldo J. Upton, a specialist in nervous and mental diseases. He represented that he had no injury or illness during his military service and was in good physical condition when discharged but that a few months later he became nervous, weak and unable to endure noise. The doctor diagnosed the case as one of mild neurasthenia characterized by weakness, irritability and quick fatigue under stress. He found petitioner able to work at any occupation involving light labor with reasonable regularity and without danger. He also examined petitioner in 1928, 1929 and 1930. At the first examination petitioner reported that in 1926 and 1927 he had suffered attacks of unconsciousness. The doctor found petitioner suffering from severe neurasthenia and severe hysteria. In 1930 he found petitioner had pronounced psychoneurosis and that his condition suggested he was developing grand mal epilepsy. The doctor's testimony indicates that from 1924 petitioner's condition became progressively worse.

In 1926, Dr. Herman found petitioner was having grand mal epileptiform seizures. He prescribed medicine and sent petitioner to a government hospital where he remained a month. In August, 1927, Dr. James O'Neill examined him. Petitioner said he had not been sick in the army and had sustained no injury except to his ankle and a slight gassing, but that he had been nervous practically from the time he left the army. Within the previous year he had suffered infrequent fits and had not then worked for nine weeks. His ailment was diagnosed as severe hysteria and the doctor was of opinion he could have worked. In March, 1929, Dr. Alan Davidson made a diagnosis of epilepsy. Petitioner then said he had been having uncontrollable nervous attacks which began when he was in the hospital in France.

Petitioner had no medical treatment between 1920 and 1926. From that time to 1930 he was sent to the hospital seven times and received treatment for periods ranging from two to eight weeks. The government granted petitioner's applications for compensa-

tion. Commencing in 1924 he was rated 10 per cent. disabled and paid $9 or $10 a month. Later, increases for disability were found and more compensation was allowed until in August, 1930, his disability was rated at 100 per cent. and he was given $94.50 per month in addition to $10.50 allowed for his child.

From July, 1919, until the beginning of March, 1929, it appears that petitioner was employed more or less regularly except for periods aggregating about two years for which he does not account. Until January, 1921, he worked in a veneer factory. He was discharged, he testified, because he lost too much time by reason of weakness and dizzy spells. Then he helped on his sister's farm for three or four months. The next definite information as to his employment is that in July, 1922, he commenced as a machinist's helper in the shops of the Central Vermont Railway Company. He worked about two-thirds of full time until May 15, 1923, when he was laid off on account of force reduction. It does not appear what he did from then until February 18, 1924. At that time he was again employed by the Central Vermont, and worked nearly full time as a laborer until May when he quit in order to work in the Boston & Maine Railroad shops. In the following November he was discharged because, as he said, illness caused him to lose too much time. In December, 1924, he was employed for the third time by the Central Vermont. He worked about 85 per cent. of the time until August 23, 1926. Then he went to the hospital for a month, but he did not return until November; he worked nearly full time for the remainder of the year. In 1927, he worked about half time: that is, until the end of June he worked about 85 per cent. of full time, he then went to the hospital for an undisclosed period, and in October and November he worked about 70 per cent. of full time. Then he was out until the end of January, 1928. Thereafter, until he was discharged in March, 1929, he worked about 80 per cent. of full time.

On each of the three occasions he went to work for the Central Vermont, he made application for employment in which he represented himself to be free from bodily complaints and of a strong constitution. The record contains testimony that throughout the period of this employment petitioner seemed tired and ill, that he was transferred a number of times to lighter work, and that, had he not been a veteran, he would have been discharged.

The substance of petitioner's testimony, in so far as it adds materially to the facts and evidence above referred to, may be stated briefly:

June 16, 1918, a shell explosion threw him, injured his ankle, shocked him severely, and caused him to lose consciousness for a time and to suffer spells of dizziness, headaches, weakness and great perspiration at least once a week during the month he remained in the hospital. Desiring to leave the hospital, he refrained from disclosing his illness to attending physicians or others. After he resumed active service, the spells became worse. He disclosed his condition to the company commander and because of it was assigned to work in the kitchen. He did not get better while in France. After discharge, April 29, 1919, he went to his mother's home in Vermont and rested for some months. The spells continued, grew worse and sometimes would last a day. After commencing work in July, 1919, he was unsteady and weak, lost much time and on account of his condition was given lighter work and finally discharged in January, 1921. Early in 1923, he suffered a seizure in which he lost consciousness for about 15 minutes. So far as appears, this was the first seizure in which petitioner fell or became unconscious. Later he suffered such attacks with increasing frequency and intensity.

At the trial, medical men gave opinion evidence which, when considered in connection with the facts and circumstances rightly to be taken as proved, is sufficient to sustain a finding that petitioner's illness before and after the lapse of the policy resulted from injuries and exposure while in the military service and that the epileptiform and epileptic fits, such as that suffered March 1, 1923, and later, are not curable.

The war risk contract unqualifiedly insures against "total permanent disability". The occasion, source or cause of petitioner's illness is therefore immaterial.[2] His injuries, exposure and illness before the lapse of the policy and his condition in subsequent years have significance, if any, only to the extent that they tend to show whether he was in fact totally and permanently disabled during the life of the policy.[3] March 9, 1918, in pursuance of the authori-

[2]United States *v.* Golden, 34 F. (2d) 367, 370. United States *v.* Tyrakowski, 50 F. (2d) 766, 768.

[3]Carter *v.* United States, 49 F. (2d) 221, 224. Eggen *v.* United States, 58 F. (2d) 616, 619. Wise *v.* United States, 63 F. (2d) 307, 308. United States *v.* Clapp, 63 F. (2d) 793, 795. United States *v.* Linkhart, 64 F. (2d) 747, 748.

zation contained in the War Risk Insurance Act,[4] the director of the bureau ruled (T. D. 20 W. R.): "Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed to be total disability. Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it."

The phrase "total permanent disability" is to be construed reasonably and having regard to the circumstances of each case. As the insurance authorized does not extend to total temporary or partial permanent disability the tests appropriate for the determination of either need not be ascertained. The various meanings inhering in the phrase make impossible the ascertainment of any fixed rules or formulae uniformly to govern its construction. That which sometimes results in total disability may cause slight inconvenience under other conditions. Some are able to sustain themselves, without serious loss of productive power, against injury or disease sufficient totally to disable others. It cannot be said that injury or disease sufficient merely to prevent one from again doing some work of the kind he had been accustomed to perform constitutes the disability meant by the Act for such impairment may not lessen or affect his ability to follow other useful, and perchance more lucrative, occupations. Frequently serious physical impairment stimulates to successful effort for the acquisition of productive ability that theretofore remained undeveloped.

The above quoted administrative decision is not, and manifestly was not intended to be, an exact definition of total permanent disability or the sole guide by which that expression is to be construed. If read literally, every impairment from time to time compelling interruption of gainful occupation for any period, however brief, would be total disability. And, if such impairment were shown reasonably certain not to become less, it would constitute total permanent disability. Persons in sound health occasionally

[4] ". . . The director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes . . ." Section 13, added by § 2, Act of October 6, 1917, 40 Stat. 399.

suffer illness requiring them to remain in bed for a time. It is not inaccurate to describe such illness as "total disability" while it lasts. But clearly it is not right to say that, if they remain sound but reasonably certain throughout life occasionally to have like periods of temporary illness, they are suffering from "total permanent disability". Such a construction would be unreasonable and contrary to the intention of Congress. "Total disability" does not mean helplessness or complete disability but it includes more than that which is partial. "Permanent disability" means that which is continuing as opposed to what is temporary. Separate and distinct periods of temporary disability do not constitute that which is permanent. The mere fact that one has done some work after the lapse of his policy is not of itself sufficient to defeat his claim of total permanent disability. He may have worked when really unable and at the risk of endangering his health or life.[5] But manifestly work performed may be such as conclusively to negative total permanent disability at the earlier time.[6]

It requires no discussion to show that the evidence in respect of petitioner's condition during the life of the policy has no substantial tendency to prove total permanent disability at the time of the lapse. The evidence as to his subsequent condition may be considered only for the purpose of determining his condition while the contract was in force. His conduct following the alleged accrual of his claim reflects his own opinion as to whether he was totally and permanently disabled at the time of the lapse. His own statements to medical men, their diagnoses, his repeated applications to the Government for compensation and his failure earlier to assert any claim show that for a decade he did not believe that he was totally and permanently disabled when he let his policy lapse May 31, 1919. And in the absence of clear and satisfactory evidence explaining, excusing or justifying it, peti-

[5]United States *v.* Phillips, 44 F. (2d) 689, 691. United States *v.* Godfrey, 47 F. (2d) 127. Carter *v.* United States, 49 F. (2d) 221, 223. United States *v.* Lawson, 50 F. (2d) 646, 651. Nicolay *v.* United States, 51 F. (2d) 170, 173.

[6]United States *v.* Harrison, 49 F. (2d) 227. Nicolay *v.* United States, 51 F. (2) 170, 173-4. United States *v.* Perry, 55 F. (2d) 819, 824. United States *v.* McGill, 56 F. (2d) 522, 524. United States *v.* Diehl, 62 F. (2d) 343, 344.

tioner's long delay before bringing suit is to be taken as strong evidence that he was not totally and permanently disabled before the policy lapsed.[7]

It may be assumed that occasional work for short periods by one generally disabled by impairment of mind or body does not as a matter of law negative total permanent disability. But that is not this case. Petitioner, while claiming to be weak and ill and, contrary to the opinion and diagnoses of examining physicians, that he was really unable to work, did in fact do much work. For long periods amounting in the aggregate to more than five years out of the ten following the lapse of the policy he worked for substantial pay. No witness, lay or expert, testified to matters of fact or expressed opinion tending to support petitioner's claim that he had suffered "total permanent disability" before his policy lapsed. Unless by construction these words are given a meaning far different from that they are ordinarily used and understood to convey the evidence must be held not sufficient to support a verdict for petitioner. The trial court should have directed a verdict for the United States. *Gunning* v. *Cooley*, 281 U. S. 90, 93. *Stevens* v. *The White City*, 285 U. S. 195, 204.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

---

[7]United States *v.* Hairston, 55 F. (2d) 825, 827. Wise *v.* United States, 63 F. (2d) 307, 308. United States *v.* Linkhart, 64 F. (2d) 747, 748. And see United States *v.* Eggen, 58 F. (2d) 616, 618.